85-910

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAMUEL WHITEHEAD,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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November, 1985

Merrill/Chicago • 372-2800

QUESTION PRESENTED

Whether petitioner's substantive federal rights were denied by the Kentucky Courts which relied on Kentucky law and refused to follow federal law in 1. instructing the jury on damages and burden of proof based on *Kentucky Instructions to Juries*, 2. refusing to instruct the jury on the issues of assumption of the risk and *res ipsa loquitur*, and 3. overemphasizing petitioner's conduct with the result that the jury found him 90% contributorily negligent.

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REFERENCE TO REPORTS

The opinion of the Court of Appeals of Kentucky is appended hereto at A-1 through A-6. The Order denying Motion for Discretionary Review of the Supreme Court of Kentucky appears at pages A-7.

JURISDICTION

The judgment of the Court of Appeals of Kentucky affirming the judgement of the Trial Court entered on December 5, 1983 was entered on May 3, 1985. Petitioner's timely Motion for Discretionary Review was denied by the Supreme Court of Kentucky on August 28, 1985 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929, as amended 28 U.S.C. §1257(3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3.) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATUTES INVOLVED

35 Stat. 66, as amended, 45 U.S.C. §51.

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in

part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

35 Stat. 66, as amended 45 U.S.C. §54.

Assumption of Risks of Employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF FACTS

Petitioner, a resident of Danville, Kentucky, is a black conductor-trainman who on November 29, 1976 had worked for the respondent for more than eight years. At the time of trial in October of 1983, he was 41 years of age with a wife and ten children. (T.E., Vol. III, pp. 332-333)

On November 29, 1976 he was assigned as conductor on a train of 127 cars running between Danville, Kentucky and Oakdale, Tennessee. (T.E. Vol. III, pp. 342-348). He rode at the end of the train in a metal caboose with a wood floor and seats or benches on both sides. There were iron bars used as handholds next to the seats and coal box. It was equipped with a coal burning stove which required manual fueling. (T.E. Vol. III, pp. 347-350)

The caboose was not equipped with cushioned draw bars which would have absorbed most of the slack action. Cabooses owned by other railroads and occasionally used on respondent's line had cushioned draw bars as do respondent's cars which haul fragile commodities. Slack is the distance between knuckles or couplers which may be a little more or less than four inches. Going down hill the cars' knuckles or couplers all push together and the slack runs in; going up hill the knuckles or couplers all pull apart the four inches, more or less, and the slack runs out.[1] (T.E. Vol. III, pp. 352-353)

Petitioner testified that the occurrence which brought about his injury happened in the following manner.

> "A. Well, as we went through — went into Cedar Grove there, which would be about Milepost 164, which as you come out of Woods, slack would go in on your train, go on by Woods and into Eljhu as usual, there's a little dip, it would come out there; as you turned over into Eljhu the rear end of your train would run back in. And at this position, this is where I thought it would be safe to get up and put coal in the stove, because this you have to do at some point or other and all you have to do is figure out where would be the safest for you to do it. And, I got up the put coal in the stove and the slack came out and jerked me down and hurt my back. And, at this place it shouldn't have been a slack in the train whatsoever, one way or the other. The cab shouldn't have had a run-in and it shouldn't have had a run-out, neither one." (T.E., Vol. III, pp. 350-351)

and further

> "Slack came out and it's — it just came out hard, it's the hardest slack that I believe I've ever encountered as a conductor on the railroad, and it jerked — it was

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[1] There is more than 42 feet of slack in a train of 127 cars.

hard enough that it jerked my hand loose from the bar and jerked me down." (T.E. Vol. III, p. 355)

That there was unusual and violent slack action at the time and place of petitioner's fall was confirmed by the flagman who was the only other person in the caboose. (T.E. Vol. III, pp. 421-422; 437-441)

The locomotive engineer had exclusive control of the speed and braking of the train. Petitioner had no control over length of the train, the placement of cars in it or the track or terrain over which it operated. (T.E. Vol. III, pp. 345-347)

Respondent contended through three witnesses and photographs that petitioner was not in a proper place at the time he was injured. (T.E. Vol. V, pp. 744-746; 767-768. T.E. Vol. VI pp. 819-820; 829. T.E. Vol. VI pp. 845-854) Respondent introduced no rule, bulletin or any other directive requiring its employees on the caboose to be seated at all times.

Petitioner underwent low back surgery performed by two different doctors on January 20, 1977, (T.E. Vol. III, pp. 376-377) July 26, 1978 (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 p. 15) and May 27, 1979 (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 p. 26). In the opinion of Dr. Goldman, petitioner is permanently disabled from his occupation of Conductor-Trainman. (T.E. Vol. IV, p. 614; Goldman deposition of 10-2-81 pp. 39-41) Respondent offered no evidence to refute this opinion. Petitioner also testified that he had been unable to find any employment of a lighter nature. (T.E. Vo. III, pp. 404-405) Respondent offered no evidence to refute this contention either.

The evidence showed that from the date of the accident to the date of trial, petitioner had lost $204,143.00 in net wages and fringe benefits (T.E. Vol. IV pp. 599-608) and $4,959.00 in out-of-pocket medical expenses. (T.E. Vol. IV, pp. 629-630)

Dr. James Altman an economics expert testified that the present value of petitioners future wage loss is $512,837.00,

the present value of lost fringe benefits is $184,621.00 and that $66,186.00 had to be added to compensate for future taxes (T.E. Vol. V, pp. 609-610). Respondent offered no economic evidence to refute these figures.

Petitioner tendered a comprehensive set of jury instructions to the court, all of which were rejected as not being in conformity with Kentucky law. Instead, the court gave its own instructions based upon 2 J. Palmore *Kentucky Instructions to Juries* (T.E. Vol.VII, pp. 895, 900, 901, 908, 909)

The jury returned a verdict for petitioner and awarded him $204,143 for lost wages and $4,959 for out of pocket medical expenses but then reduced these amounts by 90%, that being the extent to which it found petitioner contributorily negligent. It awarded no amount whatsoever to compensate petitioner for pain and suffering or future wage loss.

Judgment in the amount of $20,910.20 was entered on December 5, 1983.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its position on the federal claim at every level of the Kentucky court system.

On November 2, 1983, petitioner tendered 22 Jury Instructions based on federal law to the Trial Court which were received and made a part of the official record (T.E. Vol. III, p. 895) Over petitioner's objection (T.E. Vol. VII, p. 900-901, A-22) the Trial Court gave its own instructions based on 2 J. Palmore *Kentucky Instructions to Juries*, and rejected all of Petitioner's tendered instructions.

Petitioner raised the federal question in his brief and upon oral argument to the Court of Appeals. The Court of Appeals decided the federal question on the basis of *Cox* v *Cooper* 510 SW 2d 530 (1974) and principles set forth in 2 J. Palmore *Kentucky Instructions to Juries*.

Petitioner filed a timely Motion for Discretionary Review in the Supreme Court of Kentucky, which was denied without opinion on August 28, 1985. Thus the Court of Appeals of Kentucky is the "highest court in [the] state in which a decision could be had". 28U.S.C. §1257

ARGUMENT

Petitioner tendered to the Trial Court twenty-two proposed jury instructions which fairly and accurately stated the federal law as applied to FELA cases. Most of them, and all of the ones in controversy here, can be found in Devitt & Blackmar *Federal Jury Practice and Instructions* 3rd Ed., a widely used form book, adopted by many federal district courts.

The Trial Court summarily rejected all of the tendered instructions as being violative of the rule in *Cox* v *Cooper*, Ky., 510 SW2d 530(1974) that instructions shall provide only the "bare bones" for guidance of the jury. The Court of Appeals in affirming the action of the Trial Court in this case cited the *Cox* case with approval.[2]

In lieu of the tendered instructions the trial court formulated instructions based on 2 Palmore *Kentucky Instructions to Juries*. These instructions are set forth in their entirety at A-8 through A-15. This form book does not purport to contain any instructions for use in FELA cases.

Damages Instructions

This Court has repeatedly held, most recently in *St. Louis Southwestern Railway Company* v *Dickenson*, 470 U.S. , 84 L. Ed. 2d 303, 105 S.Ct. 1347 (1985) that " . . . it is settled that the propriety of jury instructions concerning

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[2] At the time *Cox* v *Cooper* supra was decided the Court of Appeals of Kentucky was the highest appellate court in the Commonwealth. Justice Palmore who wrote the opinion is also the author of *Kentucky Instructions to Juries* used by the Trial Court to instruct the jury in this case and cited with approval by the Court of Appeals in the decision being appealed.

the measure of damages in an FELA action is an issue of "substance" determined by federal law".

Here the Trial Court told the jury "You *may* award damages for *any or all* of the following . . . " emphasis supplied. (A-10) The jury followed the instruction literally and awarded damages only for lost income and medical expenses to the date of the trial and awarded absolutely nothing for pain and suffering, past or future, or future wage loss even though there was competent evidence to support these elements of damage and no evidence offered by respondent to refute them.

In contrast, petitioner's tendered instructions numbers 20, 21 & 22 (A-19 through A-21) would have guided the jury as to the factors it should have considered on each element. The "any or all" approach used by the Trial Court obviously confused the jury to such an extent that it failed to award anything for pain and suffering to a man who had been violently knocked down, had invasive diagnostic tests, three major back operations, and wears a back brace to this day.

Petitioner was entitled to receive compensation for *all* of the elements of damage on which there was competent unrefuted proof and it was reversible error for the court not to so instruct the jury, Kentucky common law to the contrary, notwithstanding.

The orthopaedic surgeon who performed petitioner's last two back operations testified that he was permanently disabled from his former occupation and petitioner testified as to his unsuccessful attempts to find alternate employment. Respondent offered absolutely no evidence that Dr. Goldman's opinion was unfounded or erroneous or that there was alternate work which was available to petitioner. The jury ignored this evidence but did comply with the "any or all" instruction given by the Trial Court.

We submit there can be no basis in reason or logic for the jury's failure to award damages for pain and suffering and future wage loss. The only explanation for its contradictory

verdict is that it was confused by a legally insufficient and erroneous statement of the law.

Just as this Court has previously insisted that other damage instructions conform to federal standards, *Norfolk & Western Railway Co.* v. *Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S.Ct. 755 (1980), *St. Louis Southwestern Railway Company* v *Dickerson* 470 U.S. , 84 L. Ed. 2d 303, 105 S.Ct. 1347 (1985) it should now do the same for a seriously injured railroad trainman whose congressionally created rights have been denied him by Kentucky procedure.

Petitioners rights were further denied him by the trial court's insistance that only "bare bones" instructions can be given in Kentucky under the holding of Cox v *Cooper, supra.*

Res Ipsa Loquitor Instruction.

One of petitioner's major theories of liability was the doctrine of *res ipsa loquitur*. The evidence was uncontradicted that petitioner had no control over the train's acceleration or braking system, the make up or length of the train, or the track and terrain over which it operated. Inasmuch as slack action, of the magnitude which caused petitioner to break his firm grasp on the iron bar and be thrown to the floor was not ordinary and does not occur in the absence of negligence, he tendered a "*res ipsa*" instruction as is proper under the holding in *Kansas City Southern Railway Company* v *Justis*, 5th Cir., 232 F. 2d 267 (1956); Cert. denied, 352 U.S. 833. This Court stated its reasons for approving the use of "*res ipsa*" jury instructions in FELA cases in *Jesionowski* v *Boston & Maine Railroad Company*, 329 U.S. 452, 67 S. Ct. 401 (1946). In the face of these controlling decisions the Court of Appeals of Kentucky holds that it is not a proper instruction because "it is never proper to instruct the jury as to presumption of fact or law" citing 2 J. Palmore *Kentucky Instructions to Juries*, Section 13.11(g)(1977). Aside from the fact that this Court has held on numerous occasions that state jury instructions must give way to federal substantive law, *St. Louis Southwestern Railway Co.* v *Dickerson*, supra, and

the cases cited therein, petitioner's tendered Instruction No. 17 (A-18) did not instruct the jury to presume respondent's negligence, but did say that the jury could infer such negligence if it found that petitioner had established exclusivity of control in respondent and that the slack action was sudden, unexpected and extraordinary.

Both petitioner and the only other man on the caboose at the time of the occurrence testified that the slack action which knocked petitioner to the floor was not the normal slack usually encountered but was unexpected and exceptionally severe. Totally disregarding this evidence, petitioner's lack of operational control, and the federal substantive law, the Trial Court excluded this theory of negligence from its instructions.

Assumption of the Risk Instruction

Petitioner's Instruction No. 11 (A-16) sought to instruct the jury in the language of the statute that assumption of the risk is not a defense available to respondent under the FELA. This Court in *Tiller* v *Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444 (1943), held "that every vestige of the doctrine of assumption of the risk was obliterated from the law" by 45 USC §54.

While respondent's defense may have been couched in terms of contributory negligence, in reality it was a classic presentation of the assumption of the risk defense. The respondent introduced no rules, regulations or safety bulletins requiring its employees on moving cabooses to remain seated, yet the jury was allowed to consider pictures and lengthy testimony of three witnesses relating to how petitioner should have been riding. (A-23 through A-26) None of these witnesses were even on the caboose at the time of the occurrence so they had no actual knowledge of the conditions as they then existed. The impact of their testimony, however, was that petitioner assumed the risk of his injury by the act of leaving his seat irrespective of his subsequent action to pro-

tect himself while fueling the stove, by firmly holding onto the iron safety bar installed there for that very purpose.

The fact that petitioner waited for the slack to run in, along with his knowledge that the caboose was now running downgrade and would continue to do so because of a 25 mph slow order for a period of time sufficient for him to put coal in the stove, made it reasonable for him to leave his seat when he did. Excessive slack action is always a man made condition resulting from some fellow employee's negligence, the risk of which cannot be assumed by another employee under the FELA. There was not one shred of proof that petitioner had anything to do with causing the violent slack action that knocked him down.

Petitioner's Instruction No. 11 would have placed these factors in proper perspective for the jury and the Trial Court's failure to give it had an obvious impact on the jury's verdict.

Burden Of Proof Instruction — Contributory Negligence

The Trial Court's error in refusing to give petitioner's Instruction No. 11 was compounded by its refusal to give petitioner's Instruction No. 13 (A-17) a simple, straight forward Burden of Proof Instruction. The Trial Court's instructions were silent on this standard even though both negligence and contributory negligence were at issue. The jury was never told that respondent had to prove that petitioner was contributorily negligent. Only seven years after Congress passed the FELA, the Supreme Court held that an instruction on burden of proof was a matter of federal law. *Central Vermont Railway Company* v *White*, 238 U.S. 507, 35 S. Ct. 865, 867, 868 (1915). In the case at bar, the jury was allowed to speculate that petitioner bore the burden of proving respondent's negligence and his own freedom from contributory negligence. There was nothing in the Court's instructions to indicate otherwise. The Court's instruction told the jury that it was the duty of petitioner to exercise ordinary care for his own safety and that his "failure" to do so

constituted contributory negligence. (A-9) Further, the instruction did not tell the jury that the burden is met by evidence showing that what is sought to be proved is more likely true than not true, i.e., by a preponderance of the evidence.

Without such guidelines the jury may well have thought that petitioner bore the burden of proving his freedom from contributory negligence, perhaps beyond a reasonable doubt. While neither the Trial Court nor respondent would contend that this is the law, *Dixon* v. *Penn Central Company*, 481 F2d 833, 837 (1973) the jury had no way of knowing who had to prove what or by how much evidence when it was instructed only in the nebulus, undefined concept that it was to be " . . . . . *satisfied* from the evidence that *he failed* to observe this duty". (emphasis supplied)

The only arguable evidence of any contributory negligence by petitioner was that he left his seat to put coal in the stove at a time and place he thought was not dangerous. There was evidence of respondent's negligence in that the caboose was not equipped with cushioned drawbars or an oil stove which would not require manual fueling.

Ignoring this Court's decision in *Central Vermont Railway Co.* v *White*, supra, the Court of Appeals of Kentucky approved the Trial Court's refusal to instruct on burden of proof again citing 2 J. Palmore Kentucky *Instructions to Juries* §13.11 wherein it states that . . . "[instructions] should never specifically inform the jury that one party or the other has the burden of proof, or that his evidence must "preponderate" in order for him to be entitled to a verdict".

Under these inapplicable state standards the jury found petitioner nine times as negligent as respondent. We submit that the only possible explanation for this patently unfounded result is the lack of jury instructions clearly setting forth the federal standards.

In summary, both the Trial Court and the Court of Appeals of Kentucky have allowed state procedure to deny

petitioner his federally created substantive rights. This Court has repeatedly held that the uniform application of the federal act in state and federal courts is mandatory. *Brown* v *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949); *Brady* v *Southern Ry. Co.*, 320 U.S. 476, 64 S. Ct. 232(1943); *Central Vermont R. Co.* v *White*, 238 U.S. 507, 35 S. Ct. 865 (1915). Petitioner was entitled to have his case decided by a properly instructed jury. The FELA "creates federal rights protected by federal law and that as to the propriety of jury instructions federal decisions are controlling". *Dugas* v *Kansas City Southern Railway Lines*, (5th Circuit) 473 F. 2d 821 (1973) Cert. denied 414 U.S. 823.

Under the erroneous instructions of the trial court, the petitioner was effectively deprived of his federal rights and was denied a fair trial. This constitutes reversible error under this Court's holding in *St. Louis Southwestern Railway Co.* v *Dickerson*, supra, and, therefore, we submit, petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth above we submit that this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 84-CA-1054-MR
and
No. 84-CA-2600-MR

Court of Appeals

COMMONWEALTH OF KENTUCKY

SAMUEL E. WHITEHEAD
Appellant/Cross-Appellee
v.
SOUTHERN RAILWAY COMPANY
Appellee/Cross-Appellant

Appeal from Jefferson Circuit Court
Action No. 79-CI-10368
Honorable Kenneth Corey, *Judge*

Cross-Appeal

OPINION RENDERED: May 3, 1985; 10:00 a.m.
NOT TO BE PUBLISHED

AFFIRMING ON APPEAL

AFFIRMING ON CROSS-APPEAL

BEFORE: COMBS, DUNN and MILLER, Judges.

MILLER, JUDGE. This is an appeal and cross-appeal from a judgment entered upon a jury verdict in an action under the Federal Employers' Liability Act (FELA) [45 U.S.C. §§51-60 (1982)] and Federal Safety Appliance and Equipment Act [45 U.S.C. §§1-43 (1982)]. The action was filed on November 5, 1979. Judgment was entered on December 5, 1983.

On November 29, 1976, appellant/Samuel E. Whitehead (Whitehead) was a conductor on Southern Railway Company's (Southern) 127-car freight train on a run between

Danville, Kentucky, and Oakdale, Tennessee. He had been a trainman for Southern since 1968, and a conductor since 1970.[1] He had made the run some 300 times per year for many years. On November 29, 1976, Whitehead stood up in the caboose to stoke a coal stove and was jostled from his feet by the "slack action" of the train as it traversed a grade in the roadbed.[2] The train was operating at approximately 25 miles per hour, pursuant to a "slow order" issued because of track conditions. Whitehead injured his back which resulted in three back operations. He brought this suit for damages. The jury was instructed to consider damages for medical expenses (past and future), lost wages (to date of trial), pain and suffering (past and future), and impairment of power to labor and earn money after the date of trial (permanent injury). The jury returned a verdict for medical expenses and lost wages, but specifically denied damages for pain and suffering and permanent injury. The jury further apportioned negligence between Whitehead and Southern at 90% on the former and 10% on the latter.

On this appeal, Whitehead asserts (1) error in refusing to permit introduction of certain answers given by Southern to interrogatories; (2) error in the jury's failure to return a verdict for pain and suffering and permanent injury; and (3) error in failing to render instructions tendered by plaintiff. Southern cross-appeals, claiming it was free of negligence.

We first consider the claims on Whitehead's appeal. There is no error in refusing introduction of answers to interrogatories. During trial, three of Southern's witnesses testi-

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1. As conductor, Whitehead was in overall charge of the train. He rode in the caboose and had communication with the operating crew in the engine.

2. Basically, "slack" is the distance between the knuckles or couplers which may be a little more or less than four inches. Going down hill, the cars (knuckles or couplers) all push together and the slack "runs in;" going up a hill, the knuckles or couplers all pull apart the four inches, more or less, and the slack "runs out." It is a common characteristic of railroading.

fied that Whitehead acted improperly in standing up to attend the stove at the time and place and while the train was in motion. In rebuttal, Whitehead sought to introduce Southern's answer to interrogatory number 31 to the effect that it did not claim Whitehead was violating any rule at the time of his injury. The interrogatory provides in relevant part as follows:

> "State whether defendant claims any violation by the plaintiff of any rule . . . "
>
> Answer: No.

Any error emanating from the trial court's refusal to admit the answer to interrogatory 31 in rebuttal was harmless. CR 61.01. As we read the record, Southern's contention was not that plaintiff violated any safety rules promulgated by the railroad, thereby contributing to his own injury, but rather that he violated a common sense rule known to all railroadmen. We find no deception in Southern's answer nor do we perceive that the jury was shortchanged in not being able to consider same.

As to the jury's failure to return a verdict for pain and suffering and for permanent injury, we find no basis for review. The verdict may be considered inconsistent in that a verdict was given for medical expenses without a corresponding award for pain and suffering. *Cf. American States Insurance Company* v. *Audubon Country Club*, Ky., 650 S.W.2d 252 (1983). However, we believe the rule in *Stucker* v. *Bibble*, Ky., 442 S.W.2d 578 (1969), is still the law in this jurisdiction. The *Stucker* rule requires that the inconsistency arising from the failure of a jury to award other damages in addition to medical expenses is waived unless brought to the attention of the trial court before discharge of the jury. There was no such request in the case at hand. Further, we observe that it was stated in *Audubon Country Club*, *supra*, at 254, (albeit waiver was not an issue) that a jury need only "address the

question and give some answer." In this regard, we note that form verdict number I provided in relevant part as follows:

VERDICT NO. I

We, the Jury, find for the Plaintiff, Samuel L. Whitehead, and award him damages against the Defendant, Southern Railway Company, as follows:

Medical expenses	s/ 4,959.00
Lost Wages	s/204,143.00
Pain and Suffering	s/ -0-
Impairment of his Power to Labor and Earn Money	s/ -0-
TOTAL AWARD	s/209,102.00

s/ John H. Flodstrom

FOREMAN

It is clear the jury did, in fact, address the questions of pain and suffering and permanent injury, pursuant to the instructions, and manifested their consideration in the form verdict by inserting a zero rather than leaving the space blank. We are further convinced from the voluminous record that the jury was well within it prerogative in denying an award for permanent injury and for *future* pain and suffering. The evidence simply compels a contrary result. Therefore, the only serious question is failure to award a sum for pain and suffering to date of trial — a matter we deem waived. *See Stucker, supra.*

Finally, appellant's contention that the instructions tendered by the court were erroneous and that his own tendered instructions should have been given is without merit. We have carefully examined both sets of instructions and cannot conclude that a rendering of plaintiff's instructions would have

likely changed the result. We find no significant difference in the instructions given and those proffered.

If there is a significant difference in the instruction, it lies in the fact that the instruction required the jury only to "believe from the evidence" or "be satisfied from the evidence," in order to find for appellant rather than find that the evidence preponderated in his favor. We believe that such an instruction was more favorable to appellant. In any event, this jurisdiction does not recognize the preponderance rule. 2 J. Palmore, *Kentucky Instruction to Juries*, §§13.09 — 13.11 (1977).

Further, appellant complains that the jury should have been instructed upon the presumption arising under *res ipsa loquitor*. So far as we know, it is never proper to instruct the jury as to presumption of fact or law. 2 J. Palmore, *Kentucky Instructions to Juries*, §13.11[g] (1977).

Finally, at oral argument, appellant strongly complained of the trial court's refusal to render his "standard" set of instructions which he contended were tailored by the federal judiciary in FELA cases. It is our belief that instructions are essentially matters of procedure. They do not determine what substantive rights a citizen has, but rather are a guide in judicially acquiring those rights. In FELA cases, the procedural rules of the state are applicable to actions brought in state court. *See St. Louis Southwestern Railway Company* v. *Dickerson*, U.S. , 105 S. Ct. 1347 (1985) (holding, however, that an instruction as to the amount of recovery is a matter of substantive law and therefore not subject to state procedural rules). The instructions rendered fairly comported with the requirement of this jurisdiction that instructions shall provide only the "bare bones" for guidance of the jury with the right of counsel to flesh-out in closing argument. *See Cox* v. *Cooper*, Ky., 510 S.W.2d 530 (1974).

In considering Southern's cross-appeal, we find the same without merit. There was ample evidence to create a submis-

sible issue as to Southern's negligence under the Acts sued upon.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed on appeal and cross-appeal.

ALL CONCUR

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85-SC-445-D
(84-CA-1054-MR & 84-CA-2600-MR)

Supreme Court of Kentucky

JEFFERSON CIRCUIT COURT
#79-CI-10368

SAMUEL WHITEHEAD

Movant

v.

SOUTHERN RAILWAY COMPANY

Respondent

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of movant for a review of the decision of the Court of Appeals is denied.

ENTERED August 28, 1985.

s/ Robert F. Stephens
Chief Justice

No. 79CI10368

Jefferson Circuit Court

NINTH DIVISION
JUDGE KEN G. COREY

SAMUEL L. WHITEHEAD

Plaintiff

v.

SOUTHERN RAILWAY COMPANY

Defendant

INSTRUCTIONS TO THE JURY

The Court instructs the Jury as follows:

1. It was the duty of the Defendant, Southern Railway Company, (hereinafter referred to as Southern), acting through its officers, agents, and employees, to exercise ordinary care to provide the Plaintiff, Samuel L. Whitehead (hereinafter referred to as Whitehead), with a reasonably safe and suitable place in which to work, and reasonably safe and suitable equipment, including the caboose about which you have heard evidence.

If you are satisfied from the evidence that the Defendant, Southern, its officers, agents, or employees, failed to observe this duty and that such failure, if any, caused in whole or in part the injury to the Plaintiff, Whitehead, then your verdict will be in favor of the Plaintiff, Whitehead, against the Defendant, Southern. If the Jury finds for the Plaintiff under this Instruction, you are instructed to utilize Verdict Form I.

But unless you so believe, then you shall return a verdict for the Defendant, Southern. If the Jury finds for the Defendant, you are to utilize Verdict Form III.

2. It was the duty of the Plaintiff, Whitehead, on the occasion concerning which you have heard evidence, to exercise ordinary care for his own safety. If the Jury is satisfied from the evidence that he failed to observe this duty, and that such failure, if any, caused or contributed to cause and bring about the accident and his resulting injuries, then the Plaintiff, Whitehead, was guilty of contributory negligence and you will so find.

3. Whenever an employee of a railroad is injured while engaged in the course of his employment, and the injury was caused in whole or in part from the negligence of any of the officers, agents, or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. Therefore, if you find that the Plaintiff, Whitehead, is guilty of contributory negligence, as set forth in Instruction #2 above such contributory negligence does not defeat or bar his recovery altogether, but the damages as hereinafter set forth shall be diminished by the jury in proportion to the amount of negligence attributable to him. If the Jury finds the Plaintiff Whitehead to have been contributorily negligent it shall determine the percentage of such negligence and diminish any award to him by such percentage, and utilize Verdict Forms I and II.

4. If you believe from the evidence that the Plaintiff, Whitehead, was negligent in that he violated the duty imposed upon him by Instruction #2, and that such failure, if any there was upon his part, was the sole cause of his accident and resulting injury, then you shall return a verdict for the Defendant Southern. If you so find, you shall utilize Verdict Form III.

5. If the jury finds for the Plaintiff, Whitehead, you will award him such sum in damages that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence that he has sustained directly by reason of the accident. However, you should not allow him any compensation for any affliction which he has which did

not directly result from the injury he claims to have received from the occurences referred to in this case.

You are further instructed that if you find that the Plaintiff exercised reasonable care in selecting a physician or surgeon, he may recover damages to the full extent of the injury sustained, even though the physician or surgeon does not use the most approved remedy or the best means of cure, or fails to exercise the degree of care and skill which any other physician or surgeon might have exercised. You may award damages for any or all of the following:

a. for such pain and suffering, mental and physical, which he has endured and which you may believe from the evidence it is reasonably certain he will endure in the future.

b. for such permanent impairment of his power to labor and earn money as you may believe from the evidence he is reasonably certain to lose on or after November 2, 1983.

c. Any award under (b) above must be reduced to its present cash value and adequate allowance must be made for the earning power of money, and future earnings should be calculated on the length of time the Plaintiff would expect to be employed rather than on the time he would expect to live. You are entitled to consider on the one hand, all factors or circumstances such as illness, retirement either compulsory or voluntary, the nature and hazards of the employment of the Plaintiff, accidents, the possibility of obtaining other suitable employment, death, or other like matters which might tend to decrease the loss; on the other hand, you are entitled to consider such further factors as aptitude, industriousness, possibility of promotion, increase in wages and other like matters which might lead to increase the loss.

d. For such sum in damages as you believe from the evidence will fairly and reasonably compensate the Plaintiff for the loss of wages or income that he was caused to lose from the date of the accident, November

29, 1976, to date, not to exceed on this account the sum of $204,143.00, the amount claimed by the Plaintiff.

e. For such in damages as you believe from the evidence will fairly and reasonably compensate him for reasonable medical expenses both in the past and in the future, not to exceed $4,959.00, as you believe from the evidence he sustained directly by reason of the injury.

Your whole award is not to exceed the sum of $1,000,000.00, the amount claimed by the Plaintiff in his complaint.

6. If you find for the Defendant, Southern, you will say so by your verdict and no more.

7. You are further instructed that your award to the Plaintiff, Whitehead, if any, will not be subject to any income taxes and you should not consider any such taxes in fixing the amount of your award.

8. "Negligence" is the failure to exercise ordinary care.

"Ordinary care" as applied to the Defendant, Southern, is that degree of care customarily exercised by ordinarily careful and prudent railroads under circumstances like or similar to those concerning which you have heard evidence.

"Ordinary care" as applied to the Plaintiff, Whitehead, means that degree of care which ordinarily reasonable and prudent conductors would exercise under circumstances like or similar to those concerning which you have heard evidence.

9. Nine or more of you may make a verdict. If less than twelve agree upon a verdict, all who agree thereto will sign it. However, if your verdict is unanimous, only your Foreman, whom you yourselves will choose, need sign it.

s/ KEN G. COREY

KEN G. COREY, JUDGE

VERDICT NO. I

We, the Jury, find for the Plaintiff, Samuel L. Whitehead, and award him damages against the Defendant, Southern Railway Company, as follows:

Medical expenses	$ 4,959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of his Power to Labor and Earn Money	—0—
TOTAL AWARD	209,102.00

s/ John H. Flodstrom
FOREMAN

Members of the Jury if not unanimous:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT NO. II

We, the Jury, find under Instruction Number 3 that the Defendant violated its duty owed to the Plaintiff, and further that the Plaintiff was contributorily negligent with reference to the November 29, 1976 accident.

Pursuant to Instruction Number 3, we find the total damages sustained by the Plaintiff to be as follows:

Medical expenses	$ 4,959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of his Power to Labor and Earn Money	—0—
TOTAL AWARD	209,102.00

FOREMAN

We further find that the Plaintiff was contributorily negligent to the extent of 90% and therefore reduce the Plaintiff's damages by such percentage.

_____

FOREMAN

*Members of the Jury if not unanimous:

s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	s/ _____
s/ _____	_____
s/ _____	_____

* *The signatures of 10 of the 12 jurors appear on the original verdict form.*

VERDICT NO. III

We, the Jury, find for the Defendant, Southern Railway Company, and award the Plaintiff, Samuel L. Whitehead, nothing.

_____

FOREMAN

Members of the Jury if not unanimous:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 11

Section 4 of the Federal Employers' Liability Act (45 U.S.C.A. § 54) provides in part that:

> "In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

If the plaintiff's injury is caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of his employment, then the defendant employer would be responsible for the act or omission of the fellow employee.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.11

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 13

Although the burden is on the party, who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 71.13

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 17

If you find, however, (1) that the injury to the Plaintiff was caused by a sudden, unexpected and extraordinary slack action in the movement of the train, (2) that at the time of the accident the operation of the train and the track upon which it was running were solely under the management, operation and control of and in the exclusive possession of the defendant; and (3) that in the normal course of events the accident and ensuing injury would not have occurred without the negligence of those having the management, operation, and control and exclusive possession of the train and track upon which it was running, then you may find that the accident and ensuing injury were caused by the negligence of the defendant.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 80.08

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 20

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

(1) the reasonable value, not exceeding the actual cost to the plaintiff, of any examinations, attention and care by physicians and surgeons and others shown by the evidence in the case to have been reasonably required and actually given in the treatment of the plaintiff;

(2) also the reasonable value, not exceeding the actual cost to the plaintiff, of any hospital accommodations and care, services of nurses or attendants, ambulance service, x-ray pictures, medicine and other supplies, if any, shown by the evidence in the case to have been reasonably required and actually used in the treatment of the plaintiff.

(3) also any reasonable and necessary expense to the plaintiff for medical, surgical, hospital and other services and care and supplies, which you find from the evidence in the case are reasonably certain to be required in future treatment of the plaintiff as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.03

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 21

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

(1) The reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation, as a result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled.

(2) Also such sum as will reasonably compensate the plaintiff for any loss of future earning power caused by the injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries, whether or not they are reasonably certain to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injury upon his future earning capacity, and, second, the present value of any loss of future earning power, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.04

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 22

If you should find that the plaintiff is entitled to a verdict, you will award him a sum which will compensate him reasonably for (1) any pain, suffering and mental anguish already suffered by him and resulting from the injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that he is reasonably certain to suffer in the future from the same cause.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.05

EXCERPTS FROM THE TRANSCRIPT OF EVIDENCE
NOVEMBER 2, 1983

(WHEREUPON, the following was heard before the jury entered the courtroom.)

THE COURT: Now, we can go on the record. Copy of the Plaintiff's tendered instructions including the proposed instructions that were tendered this morning, which, I assume, you received a copy of?

MR. GREENWELL: I just received it this morning, Your Honor.

THE COURT: And copy of the Defendant's proposed instructions.

(WHEREUPON, Plaintiff's Requested Jury Instructions and Defendant's Proposed Jury Instructions were received into evidence and have made a part of the official record hereof.)

THE COURT: Okay. Mr. VanBree and/or Mr. Hastings?

MR. VanBREE: Yes, Your Honor. Of course, we strenuously object to the Court's failure to give our requested instructions as tendered. Specifically . . .

THE COURT: You mean that booklet you gave me?

MR. VanBREE: Yes, Your Honor. I think that even though it comes from the Federal Book of Devitt and Blackmar, I think it is an accurate and fair statement of law and we would be entitled to have those instructions given.

EXCERPTS FROM THE TESTIMONY OF LOCOMOTIVE ENGINEER, TALMADGE GLEN SHEWMAKER

Q. What do trainmen working on the railroad do in the ordinary course of their everyday work to protect themselves from slack action?

A. Set in their seat and be braced.

Q. Now, specifically with regard to a conductor like Mr. Whitehead was on November 29, 1976, where should he be seated, sir?

A. In the seats provided for him.

Q. And where are those seats located?

A. In the caboose.

Q. At what part of the caboose in relationship to the . . .

A. Well, they're about in the center of the caboose with a bay window where you can observe your train.

Q. Okay. Now, when a conductor is on that caboose while the train is moving or whoever is on the caboose while the train is moving, what are their duties with respect to the train?

A. They're to sit in that seat and watch their train, set forward in the seat and watch the train for hot box or whatever, anything that would be out of normal to the train.

Q. And you've ridden on a caboose many or few times?

A. Many.

Q. And in order to watch the train while it's in movement and perform the duties of a conductor, is thee any place other than the seat of the bay window that the conductor should be?

A. No, sir.

Q. Sir, what about a new employee that comes on with the railroad? Now, Mr. Whitehead had been there some eight and a half years, but what about a new employee? What, if anything, is he instructed on with respect to moving trains?

A. Well, normally, he'd be instructed by an older employee. When they go to work on the railroad, why, you're kind of like it's on-the-job training program and you work under someone else and they explain to you what you should and shouldn't do.

Q. What's the first thing that a man would learn when he goes on a train that's making a run from Danville to Oakdale, Tennessee?

A. It would be to be seated at all times when the train is moving.

Q. Mr. Shewmaker, I want you to assume the following facts to be true that have been testified to. On the night of November 29, 1976 southbound train from Danville to Oakdale, Tennessee is approaching Cedar Grove Kentucky; the conductor or Mr. Raines, one or the other, from the caboose calls you and says, 'We have a "slow order" at Cedar Grove'; thereafter the conductor feels the train slowing down, "slow order" calls for twenty-five miles per hour and the train is slowing down to approximately twenty-five miles an hour as you're approaching or nearing or possibly already into the "slow order" at the head end of the train. Assuming all of those facts to be true, sir, where would you normally expect the conductor and persons in the caboose to be at that time?

A. I'd expect them to be sitting in their seats.

EXCERPTS FROM THE TESTIMONY OF LOCOMOTIVE ENGINEER ROBERT E. MOORE

Q. If you were the conductor in Mr. Whitehead's position what in the ordinary, customary way of doing things on the railroad would you do while you're riding in a caboose going through that area?

A. I'd be sitting in my observation seat with my feet braced.

Q. Okay. Now, with respect to the conductor's job while a train is doing, where is he supposed to be to perform his job?

A. Supposed to be in his seat observing torque (sic, foreward) of the train.

Q. Okay. Sir, would you tell the jury where the safest place on the caboose is at a time when the train is experiencing slack action?

A. Well, the safest place would be in the seat.

Q. In the seat where the windows are?

A. In the caboose. Yes, in the observation seat.

EXCERPTS FROM THE TESTIMONY OF GENERAL ROAD FOREMAN OF ENGINES, JACKSON SHERMAN ANDERSON

Q. And would you tell us what the pictures are depicting you doing?

A. Sitting in a proper position in a caboose expecting slack action and normal riding.

Q. Okay. And there is what has been identified as Defendant's Exhibit I4 and that is another view, I take it, of the — well, you tell them what it is a view of.

A. This is a view, it doesn't show the same thing. It shows me looking forward, braced and holding on, expecting slack action.

Q. Okay. And I show you now what's been marked as Defendant's Exhibit H3 and ask you if that is the observation position?

A. This is the normal position while a train is in motion observing the train through the little mirror — or window on the side, look around curves or look up the side of the train as you go along, but you're holding on.

Q. Now, I'll show you what's marked as Defendant's Exhibit G2 and ask you if you will explain what that is.

A. This is the position where you're riding when you're not expecting slack. Your feet are braced, you're not holding on, you're not expecting any slack in that position.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-910

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SAMUEL WHITEHEAD, - - - - Petitioner,

versus

SOUTHERN RAILWAY COMPANY, - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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December, 1985

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

When an FELA claimant elects to sue in state court instead of federal court, is the claimant deprived of any federally protected right where the state court instructs the jury on all of the elements of the federal law in the form and manner ordinarily and customarily followed in the state court instead of giving federal "pattern" instructions from a form book?

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DESIGNATION OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT PURSUANT TO RULE 28.1

Respondent, Southern Railway Company, for its compliance with Rule 28.1 of the Rules of the Supreme Court of the United States, submits the following list of all parent companies, subsidiaries, and affiliates of the Southern Railway Company:

The Alabama Great Southern Railroad Company
Norfolk and Western Railway Company
Georgia Southern and Florida Railway Company
Louisiana Southern Railway Company
Algers, Winslow and Western Railway Company
State University Railroad Company
Pittsburgh and West Virginia Railway Company
Fort Wayne Union Railway Company
Birmingham Terminal Company
Arrowood Southern Executive Park, Inc.
The National Investment Company
The Hotel Roanoke
Woodstock and Blocton Railway Company
Virginia Holding Corporation
Chattanooga Station Company
St. Johns River Terminal Company
Lenoir Car Works
New Orleans Terminals Company
Terminal Properties Inc.
Live Oak, Perry & South Georgia Railway Company
Carolina and Northwestern Railway Company
The Cincinnati, New Orleans, and Texas Pacific Railway Company
Durham and South Carolina Railroad Company
Norfolk Southern Industrial Development Corp.
Shenandoah Virginia Corporation

Atlantic and East Carolina Railway Company
Chattanooga Terminal Railway Company
Blue Ridge Railway Company
Camp Lejeune Railroad Company
Danville & Western Railway Company
High Point, Randleman, Ashboro & Southern Railway Company
Transylvania Railroad Company
Yadkin Railroad Company
The Atlanta & Charlotte Air Line Railway Company
Elberton Southern Railway Company
The Georgia Midland Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
The North Carolina Midland RR Company
Southern Railway—Carolina Division
Virginia & Southwestern Railway Company
Citico Realty Company
Dereco, Inc.
Interstate Railroad Company
Atlanta Terminal Company
N W Equipment Corporation
Dereco, Inc.-Consolidated Elimination
Southern Region Industrial Realty, Inc.
Lambert Point Barge Co., Inc.
Norfolk Southern Marine Services, Inc.
Chesapeake Western Railway
Lake Erie Dock Company
Lamberts Point Docks Incorporated
The Nickel Plate Improvement Company, Inc.
Wabash Railroad Company
The Wheeling & Lake Erie Railway Company
Pocahontas Land Corporation
Pocahontas Development Corporation

Pocahontas Land-Consolidated Elimination
Charlotte-Southern Corporation
Airforce Pipeline, Inc.
The Georgia Northern Railway Company
Southern Rail Terminal, Inc.
Southern Region Materials Supply, Inc.
Norfolk and Western-Con Elim
Southern Consolidated System
Southern Railway System-Consolidated Elimination
Norfolk Southern System Con Elim
Central of Georgia Railroad Company
Ocean Steamship Company of Savannah
Southern Region Motor Transport, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Rail Terminals of Alabama, Inc.
Tennessee Railway Company
The South Western Railroad Company
Virginia Holding Corpo Consolidated Elimination
Norfolk Southern Foundation
Arrowood-Southern Company
Tennessee, Alabama & Georgia Railway Company
NS Transportation Brokerage Corporation
Norfolk & Portsmouth Belt Line Railroad Company
Southern Region Coal Transport, Inc.
Chatham Terminal Company
Norfolk Southern Corporation
Piedmont Airlines
NorthAmerican Van Lines

Docket No. 85-910

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SAMUEL WHITEHEAD - - - - *Petitioner*

v.

SOUTHERN RAILWAY COMPANY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

STATEMENT OF THE CASE

Petitioner, Samuel Whitehead (hereinafter "Whitehead"), was the conductor on freight train No. 123 owned and operated by the Cincinnati, New Orleans & Texas Pacific Railway Company (hereinafter "CNO&TP") on a run from Danville, Kentucky, to Oakdale, Tennessee, on November 29, 1976. (T.E. Vol. III, p. 342). Counsel for Whitehead belatedly filed suit against Southern Railway Company and failed to file suit against CNO&TP until after expiration of the three-year FELA statute of limitations. However, to preserve Whitehead's claim, the trial court overruled a motion for summary judgment and disregarded the separate corporate entities of CNO&TP and Southern Railway Company. CNO&TP and Southern Railway Company were treated as one and the same at trial and will be collectively referred to herein as "Southern."

November 29, 1976, was not Whitehead's first assignment to the run between Danville and Oakdale. Whitehead was an experienced conductor and was familiar with the tracks and terrain on the run. (T.E. Vol. III, p. 411). Whitehead had made the same run over 300 times a year for eight and one-half (8½) years before November 29, 1976. (T.E. Vol. V, p. 702).

As the conductor, Whitehead was the "boss" in charge of the crew and the operation of the train. (T.E. Vol. V, pp. 694-696). He had the duties to supervise the train crew and the operation of the train. Whitehead had the right to ride anywhere on the train he wanted. (T.E. Vol. VI, p. 802). On November 29, 1976, Whitehead chose to ride in the caboose. He had radio communication with the engineer on the head-end of the train. Prior to the start of the run, Whitehead picked up a "consist" of the train from the dispatcher's office which indicated how many cars were in the train and how the train was loaded. (T.E. Vol. III, p. 342). In addition, Whitehead obtained a list of slow orders which indicated when and where on the run the speed of the train had to be slowed due to things such as track conditions, presence of work crews, track repair and maintenance. (T.E. III, p. 352; Vol. V, p. 698). Every mile of the run was marked by a mile post marker. It was ordinary and customary procedure for the conductor and engineer to radio each other when the train approached a mile marker for a slow order and to report to each other on the run-in and run-out of slack caused by a variety of factors, including changes in speed, curves and changes in track grade

and elevation. (T.E. Vol. V, pp. 686-687; T.E. Vol. VI, pp. 828, 834).

There is no dispute that slack action is an ordinary and customary part of freight train operation which cannot be avoided. (T.E. Vol. V, pp. 701, 743-744; T.E. Vol. VI, pp. 819, 829, 844). Whitehead's own testimony confirms that slack action is an ordinary and necessary part of normal freight train operation which a railroad cannot eliminate by the exercise of ordinary care:

> "Q. And there's no way for the railroad or the engineer or you or anybody else on the train to stop that slack action from running in and running out at those places?
>
> A. I wouldn't think so, no, sir."
>
> (T.E. Vol. V, p. 701).

Thus, the railroad equips all cabooses, including the one in which Whitehead was riding on November 29, 1976, with safety seats, hand holds, and places for the men aboard to brace and protect themselves against injury from slack action. (T.E. Vol. III, pp. 416-420; Defendant's Exhibits A1-A4, A6-A9; T.E. Vol. V, p. 753; T.E. Vol. VI, pp. 853-856, 865; Defendant's Exhibits F1, G2, H3 and I4). Contrary to Whitehead's assertions, cushioned draw bars or cushioned couplers do not prevent the slack action which is an ordinary and necessary part of freight train operation. (T.E. Vol. VI, p. 830). Cushioned couplers are helpful during switching operations in the yard to prevent damage to lading and to the couplers themselves from

impacts during coupling and switching operations. (T.E. Vol. VI, p. 830). However, railroadmen riding in cabooses equipped with cushioned draw bars experience slack action from the stretching and contraction of the train during a run just like railroadmen who ride in cabooses equipped with standard draw bars. (T.E. Vol. V, p. 748).

The proof introduced at trial established that the slack action involved in the normal, every day operation of a freight train can knock a man off his feet if he is out of his seat and standing up when there is a run-in or run-out of slack. (T.E. Vol. VI, pp. 816-817).

One of the first things that a man learns on the railroad is to stay seated and to brace himself whenever the train is in an area where slack action is expected. (T.E. Vol. V, pp. 703, 746). The railroad provides a track profile which engineers, conductors and other trainmen use on new assignments to determine when and where slack action should be expected. (T.E. Vol. VI, pp. 803, 806-807). In the present case, Whitehead knew the run between Danville and Oakdale like the back of his hand; he had made the run over 300 times a year for eight and one-half (8-1/2) years. (T.E. Vol. V, pp. 700-702).

Whitehead claims that he sustained his alleged injury on November 29, 1976, at or near mile post 164.5. Whitehead had admittedly left the safety of his seat, walked to the stove in the caboose, and was bending over putting coal in the stove when the alleged slack action caused him to fall. (T.E. Vol. III, p. 351). The proof showed that Whitehead had no compulsion to

leave his seat in the area of mile post 164.5 and that it was unreasonable, particularly with his knowledge and experience, for him to do so.

Although Whitehead maintains that he had no reason to expect slack action at mile post 164.5, all other railroad employees familiar with the run testified that slack action had to always be expected on every run in the area of mile post 164.5 because of the changes in the grade of the track. (T.E. Vol. V, pp. 749-750; Vol. VI, pp. 815, 818-819, 857-859). The train was passing over a section of the run where there was a hill followed by a down grade with a dip. (T.E. Vol. V, pp. 714-715). Witnesses described the territory in the vicinity of mile post 164.5 as "hilly" and "undulating". (T.E. Vol. VI, p. 815; Vol. V, p. 749; Vol. VI, pp. 858-859). One witness, with over fourteen years experience on Penn Central Railroad, CNO&TP and Southern Railway Company compared the ride around mile post 164.5 to a "roller coaster". (T.E. Vol. VI, p. 815). The track profile for the area documented the changes in the grade of the track caused by the natural terrain through the area. (T.E. Vol. VI, pp. 803, 805, 865; Defendant's Exhibit E).

In addition to the terrain features in the area of mile post 164.5, there was a slow order in effect for Whitehead's train due to track repairs near mile post 164.5 on November 29, 1976. (T.E. Vol. III, p. 351). Remarkably, Whitehead had reported the slow order to the engineer and knew that the head-end of the train was already entering the slow order area just before he left his seat to put coal in the stove. (T.E. Vol. V, pp.

719-720). The slow order and the grade changes all contributed to cause slack action in the area on November 29, 1976. Whitehead even admitted that he knew he only had "a minute, a minute and a half at most" to leave his seat, walk to the stove, put coal in the stove, stoke the fire, return to his seat and brace himself for slack action which he knew would occur. (T.E. Vol. VI, p. 873).

Whitehead's unreasonableness in leaving his seat at mile post 164.5 was underscored by his knowledge and experience on the run and the proof of the options available to him. The testimony and the track profile showed that there were stretches of track four to five miles long just before and just after the area around mile post 164.5, where Whitehead could have left his seat and put coal in the stove without any risk of slack action. (T.E. Vol. VI, p. 820-821).

Ronald Raines was a flagman riding in the caboose with Whitehead at the time of Whitehead's alleged injury. (T.E. Vol. III, pp. 439-440). Whitehead and Raines both testified that the slack action on November 29, 1976, was the most violent and severe that they had ever experienced. (T.E. Vol. III, pp. 355, 439-440). However, Raines was in his seat at the time of the alleged slack action and sustained no injury. (T.E. Vol. III, p. 445). Considering the alleged violence of the slack action and the claimed painfulness of Whitehead's injury, it is remarkable that none of the rest of the train crew noticed any unusual slack action and that Whitehead and Raines radioed no complaint about slack action or Whitehead's claimed injury to any of

the train crew. (T.E. Vol. III, p. 357; Vol. V, pp. 693, 754, 759-760; Vol. VI, pp. 824-825). Whitehead did not report his alleged injury until after the train reached Oakdale, Tennessee, which was ninety miles away from mile post 164.5, despite the railroad's requirement that all injuries be reported immediately. (T.E. Vol. III, pp. 357-358; Vol. V, pp. 689-690, 692, 759-760; Defendant's Exhibit J; Vol. VI, pp. 870-871).

The medical evidence presented at trial showed that Whitehead had only minor injuries, if any, as a result of his alleged fall on November 29, 1976. The medical evidence further indicated that the condition which Whitehead complained of at trial was not the result of a railroad injury but the result of unnecessary back surgery performed in Chicago on January 20, 1977.

Between December 1, 1976, and December 22, 1976, Whitehead was examined by four different physicians in Kentucky. (T.E. Vol. III, pp. 362-365, 368-369). None of the Kentucky physicians diagnosed any serious injury much less recommended surgery. On December 13, 1976, Dr. Thompson, an orthopedic surgeon in Lexington, Kentucky, advised Whitehead that he could return to work. (T.E. Vol. VI, p. 866; Deposition of Dr. Charles W. Sisk, p. 6; Sisk Exhibit 1). On December 22, 1976, Whitehead saw Dr. Wayne Kotcamp, an orthopedic surgeon, in Louisville, Kentucky, on his own referral. (T.E. Vol. III, p. 368). Dr. Kotcamp diagnosed Whitehead's condition as a lumbar strain and prescribed rest, warm tub soaks, and Empirin No. 3. (T.E. Vol. VI, p. 866; Deposition of Dr. Wayne Kotcamp, pp. 37-38, 40-41). Dr. Kotcamp scheduled

Whitehead for another appointment on January 22, 1977. (T.E. Vol. III, pp. 368-369). Whitehead failed to keep the appointment.

Sometime between December 22, 1976, and January 12, 1977, Whitehead employed his Chicago attorneys in this case, Henslee, Monek & Henslee. The Chicago attorneys sent him to see Dr. Gerald Rabin, an orthopedic surgeon, in Chicago, Illinois, on January 12, 1977, pursuant to their long established referral agreement with Dr. Rabin for examination of their FELA clients. (T.E. Vol. III, p. 373).

Whitehead had never heard of Dr. Rabin before he saw him on January 12, 1977. (T.E. Vol. III, pp. 372-373). When Dr. Rabin saw Whitehead on January 12, 1977, he scheduled Whitehead for admission to Belmont Community Hospital in Chicago for a myelogram and definitive low back surgery. (T.E. Vol. III, pp. 375-376). Dr. Rabin never consulted with any of the Kentucky physicians who had examined and treated Whitehead. (T.E. Vol. IV, p. 477; September 23, 1981 Deposition of Dr. Gerald Rabin, pp. 92-93).

On January 16, 1977, Whitehead was admitted to Belmont Community Hospital. Dr. Rabin performed a myelogram on Whitehead on January 18, 1977. The radiologists' report at Belmont Community Hospital showed that the myelogram was normal. However, Dr. Rabin reported that the myelogram showed a huge ruptured disc which needed to be removed right away. (T.E. Vol. IV, p. 477; September 23, 1981 Deposition of Dr. Gerald Rabin, p. 51).

In videotaped depositions of the radiologists at Belmont Community Hospital taken on April 29, 1982, the radiologists reviewed and explained all of the myelogram films on Whitehead and demonstrated that Whitehead's myelogram on January 18, 1977, showed a normal spine. The myelogram films showed no evidence of a ruptured disc much less a "huge ruptured disc" as represented by Dr. Rabin. (T.E. Vol. IV, pp. 635-636; Deposition of Dr. Miguel Jiminez, p. 12; Deposition of Dr. Samuel H. Marcus, pp. 15, 19, 27).

Nevertheless, Dr. Rabin persuaded Whitehead to submit to surgery on January 20, 1977, for the alleged removal of a ruptured disc at L4-5 and spinal fusion. (T.E. Vol. III, p. 376). Despite Dr. Rabin's claim of a successful spinal fusion, Whitehead developed severe pain and disability in the months after surgery. He decided to quit Dr. Rabin and return to the care and treatment of Dr. Kotcamp in Kentucky. (T.E. Vol. VI, p. 866; Deposition of Dr. Wayne Kotcamp, pp. 9-11). Dr. Kotcamp requested the records on Whitehead's surgery in Chicago and Whitehead's counsel advised Dr. Kotcamp that Whitehead was involved in an altercation after Dr. Rabin's surgery which may have reinjured his back. (T.E. Vol. VI, p. 866; Deposition of Dr. Wayne Kotcamp, pp. 11-12). Dr. Kotcamp declined to resume a doctor-patient relationship with Whitehead and Whitehead ended up under the care of Dr. Goldman, orthopedic surgeon, in Louisville, Kentucky. (T.E. Vol. VI, p. 866; Deposition of Dr. Wayne Kotcamp, p. 14).

Dr. Goldman had to perform two additional surgeries on Whitehead in Louisville, Kentucky, to remove scar tissue binding his nerves and to attempt to establish a solid bone fusion where Dr. Rabin had performed the original surgery. (T.E. Vol. IV, p. 614; Deposition of Dr. Martyn A. Goldman, pp. 15-16, 26). Dr. Goldman found that the bone fragments used for the spinal fusion which Dr. Rabin had attempted were floating unattached and encased in scar tissue. (T.E. Vol. IV, p. 614; Deposition of Dr. Martyn A. Goldman, p. 16). Dr. Goldman still doubts that Whitehead has a solid spinal fusion, but he is against any further surgery because of the additional scarring which it would cause.

Whitehead described his present physical condition as follows:

> "Well, physically, I can just about do most of the things [I used to do]. I just can't do as much. I can walk, I can sit around, fish a little. As I said, I can do just about anything. . . ." Deposition of Samuel Whitehead, pp. 127-128).

The trial court denied Southern's attempt to join Dr. Rabin as a third-party defendant based on lack of jurisdiction over Dr. Rabin in Kentucky. The trial court also excluded proof which Southern offered by avowal to show Dr. Rabin's reputation for performing unnecessary surgery to enhance personal injury claims. (T.E. Vol. I, p. 32).

STATEMENT OF ARGUMENT

After six days of trial and three and one-half (3½) hours of deliberation, the 12 member jury returned a 10 to 2 verdict of $209,102.00 for Whitehead, but found him ninety percent (90%) contributorily negligent. The jury's verdict was supported by the facts and should not be disturbed. Southern maintains that the jury was properly instructed on the law; Whitehead was not denied any substantive federal right; and Whitehead's Petition for Certiorari fails to demonstrate any "special and important reasons" for the United States Supreme Court to grant review on certiorari. Thus, Southern requests that Whitehead's Petition for Certiorari be denied.

ARGUMENT

I. The Record of the State Trial Court Shows That Whitehead's Substantive Rights as an FELA Claimant Were Vigorously Guarded by the Trial Court.

Whitehead's suit against Southern was improper because Whitehead was an employee of CNO&TP. Whitehead's counsel failed to sue CNO&TP until after the three year FELA statute of limitations had expired. Southern moved to dismiss the complaint against it because Whitehead was employed by another railroad, CNO&TP. CNO&TP's separate counsel filed a motion to dismiss for CNO&TP based on the statute of limitations. Nevertheless, the trial court rendered an exhaustive memorandum opinion which disregarded the separate corporate status of Southern and CNO&

TP in order to spare Whitehead's claim from summary dismissal and insure that Whitehead would have a trial on the merits of his claim. A copy of the trial court's memorandum opinion appears at Appendix 1a. Thus, this is not a case like *Brown* v. *Western Railway of Alabama,* 338 U. S. 294, 70 S. Ct. 105 (1949), where state procedure was used to defeat a federal claim on a threshold motion.

Whitehead's counsel elected to sue in the Jefferson Circuit Court, Louisville, Kentucky, instead of the U. S. District Court for the Western District of Kentucky, at Louisville, Kentucky, which was and is just down the street. The election carried with it the right to a twelve member jury and the form and manner of instructing a jury which is ordinarily and customarily employed in Kentucky.

Both counsel for Southern and Whitehead tendered proposed jury instructions to the court. Southern's tendered instructions appear at Appendix 13a. Whitehead's proposed instructions appear at Appendix 22a. Instead of giving either of the parties' instructions as tendered, the trial judge developed instructions which incorporated all the elements of the substantive federal law and were tailored to the evidence which had been presented at trial. The court's instructions appear at Appendix 38a. The authorities confirm that it was proper for the trial court to follow Kentucky law on the form and manner of giving instructions.

The form and manner of giving jury instructions is a procedural matter which should be governed by

the customs and practices of the court where suit is brought. *Platis* v. *Stockwell,* 630 F. 2d 1202, 1206-07 (7th Cir. 1980).

Platis was a diversity action where state law was controlling. It was held that the federal district judge was not bound to follow state prescribed or state "pattern" instructions. *Id.,* 1207. The reason for the rule was explained as follows:

> "Although a federal court in a diversity case must instruct a jury on all the elements of the cause of action under state substantive law, the manner of giving an instruction has been held by every court considering the question to be a procedural matter controlled by federal law. . . ."

Similarly, in *Robinson* v. *Ralph G. Smith, Inc.,* 735 F. 2d 186 (6th Cir. 1984), the court refused to require the district court judge in a negligence case out of Kentucky to follow the Kentucky practice of giving a "bare-bones instruction" instead of a longer, more specific and detailed instruction.

The rule followed in *Platis* and *Robinson* is just as instructive where an FELA claim is brought in a state court. The state court must instruct a jury on all of the elements of the cause of action under federal law, but the form and manner of giving the instruction is a procedural matter which should be controlled by state law. In *St. Louis Southwestern Railway Co.* v. *Dickerson,* 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985), this Court confirmed that "FELA cases adjudicated in state courts are subject to state procedural rules,

but the substantive law governing them is federal." *Id.*, 1348. Thus, it was not error for the trial court not to use the "pattern" instructions tendered on behalf of Whitehead.

Whitehead's Petition presents no "special and important reasons" for certiorari and should be denied.

II. The Instructions Which the Trial Court Gave the Jury Did Not Deprive Whitehead of Any Right Under Federal Law.

The damages instruction covered all of the allowable elements of damage.

This is not a case where the trial judge refused to give requested instructions on elements of damage required by substantive federal law. *Compare, St. Louis Southwestern Railway Co.* v. *Dickerson,* 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985), and *Norfolk & Western Railway Co.* v. *Leipelt,* 444 U. S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980). Moreover, this is not a case where the jury failed to return a verdict for pain and suffering and for permanent injury. The verdict which the jury returned shows that the jury addressed all the elements of damage in their deliberations and returned a verdict of "–0–" for pain and suffering and future wage loss. The Kentucky Court of Appeals properly analyzed the alleged error on damages as follows:

> "It is clear the jury did, in fact, address the questions of pain and suffering and permanent injury, pursuant to the instructions, and manifested their consideration in the form of verdict by inserting a

> zero rather than leaving the space blank. We are further convinced from the voluminous record that the jury was well within its prerogative in denying an award for permanent injury and for future pain and suffering. The evidence simply compels a contrary result. Therefore, the only serious question is failure to award a sum for pain and suffering to date of trial — a matter we deem waived. (Whitehead's brief at A-4).

The reference to waiver relates to Kentucky procedure which does not allow a litigant like Whitehead to remain silent when the verdict is returned and then attempt to ambush the verdict by a claimed inconsistency after the jury has been discharged. Unless the litigant makes objection before the jury is discharged, so that the court may return the jury to correct its verdict, the belated objection is deemed waived. *See, Stucker* v. *Bibble,* Ky., 442 S. W. 2d 578 (1969).

Whitehead's belated complaint about the verdict was properly disposed of by the Kentucky courts. Any further complaint about the verdict should fall on Whitehead's counsel for his waiver. The arguments in the Petition fail to demonstrate any "special and important reasons" for certiorari. Thus, certiorari should be denied.

III. The Trial Court's Refusal to Give a *res ipsa loquitur* Instruction Was Not Error.

The uncontradicted proof was that the slack action involved in the ordinary and customary day-to-day operation of freight trains is sufficient to knock a man

down. (T.E. Vol. VI, pp. 816-817). Whitehead testified that the engineer did not do anything wrong in operating the train on November 29, 1976. (T.E. Vol. V, p. 686). He readily admitted that there were no defects in the train itself, (T.E. Vol. V, p. 685) and he acknowledged that there was no violation of operating rules by any other railroad employee. (T.E. Vol. V, p. 697). Whitehead further acknowledged that the slack action involved in freight train operation cannot be prevented with the exercise of ordinary care. (T.E. Vol. V. p. 701). It is for this reason that cabooses are equipped with seats where trainmen can brace and protect themselves from injury from slack action. (T.E. Vol. VI, pp. 819, 829).

In contrast, the overwhelming facts in this case show that Whitehead left the safety of his seat in the caboose without any compulsion to do so at a time and place when he knew or should have known that slack action would occur.

Thus, there is no mystery about the cause of Whitehead's injury and no cause for reliance on *res ipsa loquitur*. The doctrine of *res ispa loquitur* should not apply where the facts are testified to and there is no mystery as to what happened. *Schroerlucke* v. *McDaniel Funeral Home,* Ky., 291 S. W. 2d 6 (1956); *Brady* v. *Southern Ry. Co.,* 222 N. C. 367, 23 S. E. 2d 334 (1942), *cert. den.,* 318 U. S. 792, *aff'd,* 320 U. S. 476 (1942).

Whitehead was given the right to go to the jury on the issue of the railroad's negligence based on all the evidence presented. His case was not dependent on

res ispa loquitur. Thus, the absense of a *res ispa loquitur* instruction on the facts in this case does not constitute a "special and important reason" for certiorari.

IV. Assumption of Risk Was Never Put In Issue, Thus No Instruction Against Assumption of Risk Was Required.

The proof in the present case demonstrated that it was unreasonable for Whitehead to leave the safety of his seat without any compulsion to do so at a time and place when he knew or should have known that slack action would occur. It is the unreasonableness of Whitehead's conduct which constitutes the contributory negligence on his part. In contrast, in *Dixon* v. *Penn. Central Company*, 481 F. 2d 833 (6th Cir. 1973), the court noted that the defendant did not claim and the facts did not show anything unreasonable about the injured employee's conduct:

> "Although the possibility exists that a plaintiff may negligently choose to assume a risk, we do not think that is the case here and defendant does not press the point." *Id.* 835.

The facts involving Whitehead are entirely different. Considering, among many other factors, Whitehead's experience on the railroad, his knowledge of the run between Danville and Oakdale, the certainty of slack action in the area of mile post 164.5, and his option to leave his seat at other times and places when there could be no slack action, all justified an instruction on contributory negligence and the jury's verdict that Whitehead was ninety percent (90%) contribu-

torily negligent. Assumption of risk was never raised as a defense and Whitehead's attempt to interject the issue in the jury instructions was calculated to confuse the jury. *See, Salotti* v. *The Seaboard Coast Line Railroad,* 293 Ala. 1, 299 So. 2d 695 (1974). Thus, the contention that it was error to refuse an instruction against assumption of the risk should be rejected. In any event, the absence of such instruction does not constitute a special and important reason for certiorari.

V. The Burden of Proof Was Imposed on the Proper Parties Under the Trial Court's Instructions.

The trial court's instructions which appear in the Petition at A-8 to A-12 clearly indicated which party had the burden of proof on the issues presented. The burden of proof with respect to Whitehead's negligence as the sole cause or a contributing cause to his injury was placed squarely on Southern by the court's Instructions 2, 3, and 4. Southern presented overwhelming evidence of Whitehead's negligence and the jury properly found that he was 90% contributorily negligent. In *Central Vermont Railway Co.* v. *White,* 238 U. S. 507, 35 S. Ct. 865 (1915), cited at pages 11-13 of the Petition, the defendant had requested an instruction based on Vermont law which would have put the burden of proof on the administratrix in an FELA action to show that the decedent was not guilty of contributory negligence. The requested instruction was properly rejected. No such instruction was requested and none was given against Whitehead in the present case.

Considering the trial court's instructions in their entirety and the overwhelming evidence of Whitehead's contributory negligence, the presence or absence of a specific instruction on burden of proof would not have effected the outcome of the jury's verdict.

A trial court is never bound to give instructions in the form and language in which they are requested, even if the language in the tendered instruction is taken directly from a Supreme Court decision. *Wolff* v. *Puerto Rico,* 341 F. 2d 945 (1st Cir. 1965). Instead, the test for the efficacy of instructions is whether the court's instructions fairly and fully presented the issues to the jury. *Mounds Park Hospital* v. *VonEye,* 247 F. 2d 756 (8th Cir. 1957).

Thus, the absence of a separate burden of proof instruction does not constitute a "special and important reason" for certiorari.

CONCLUSION

The record in this case is voluminous. The Kentucky Court of Appeals advised all counsel at oral argument that it had spent three weeks studying the record. The Supreme Court of the United States should not have to.

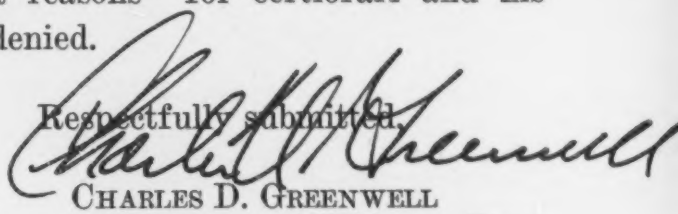
The trial court spared Whitehead's claim from dismissal for belated filing and granted him a full trial on the merits. During the six days of trial, the jury had an opportunity to hear the testimony of each of the witnesses, observe their demeanor and inspect the physical evidence introduced by both parties. There

was substantial evidence from which the jury could find, among other things, that: (1) Whitehead was an experienced railroad employee; (2) Whitehead knew that the force of ordinary and customary slack action was sufficient to knock a man down; (3) the railroad furnished a special seat for employees to use to protect themselves from slack action; (4) Whitehead knew or should have known that slack action would occur at the time and place he left the safety of his seat; (5) there were other places on the run where Whitehead could have left his seat without the risk of injury and there was no compulsion for Whitehead to leave his seat when and where he did; (6) the co-worker in the caboose with Whitehead stayed seated and suffered no injury; (7) Whitehead continued the run to Oakdale, Tennessee, without any complaint about injury or slack action although he was in radio contact with the engineer; (8) four Kentucky physicians examined Whitehead and found that the injury, if any, which Whitehead suffered, was minor; (9) Whitehead was advised that he could return to work; (10) Whitehead abandoned his Kentucky physicians at the insistence of his Chicago counsel and submitted to unnecessary surgery by a Chicago surgeon, Dr. Rabin, to enhance his FELA claim; and (11) the injury which Whitehead complained of at trial happened, if ever, on the operating table in Chicago and not on the railroad.

Based on the foregoing facts and authorities, and the evidence of record, Southern maintains that the trial court fairly and accurately charged the jury regarding Whitehead's rights under the FELA and that

the jury's verdict should not be disturbed. Whitehead's Petition for Certiorari demonstrates no "special and important reasons" for certiorari and his Petition should be denied.

Respectfully submitted,



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APPENDIX

JEFFERSON CIRCUIT COURT

NINTH DIVISION

No. 79CI10367 and
No. 79CI10368

WILLIAM R. SELBY, JR. and
SAMUEL L. WHITEHEAD - - - - - *Plaintiffs*

v.

SOUTHERN RAILWAY CO., A CORPORATION, ETC. - *Defendant*

MEMORANDUM OPINION & ORDER

This case is submitted following extensive briefs, and a hearing on February 20, 1981, on motion for summary judgment. Selby and Whitehead are railroad employees injured while at work, in two separate accidents.

Selby was injured November 12, 1976 while working as a train conductor near Stewarts Lane in Boyle County, Kentucky, when, allegedly, he was thrown from the caboose by a sudden and unexpected "violent slack action."

Whitehead was injured on November 29, 1976 while working as a "road freight conductor at or near Cedar Grove, Kentucky," again, allegedly, as a result of a sudden "unexpected and unusually violent run-in of slack."

Each filed suit under the Federal Employers' Liability Act (F.E.L.A.) claiming "Southern Railway Co., a Corporation, d/b/a The Cincinnati, New Orleans and Texas Pacific Railway Co." was his employer. Suit was filed on November 5, 1979, a few days before the statute of limitations ran.

The sole issue before this Court on this motion for summary judgment is whether or not Southern Railway Co.

(hereinafter called the "Company") is a proper party defendant, or whether the only proper defendant is Cincinnati, New Orleans and Texas Pacific Railway Co. (CNO&TP), which is a wholly owned subsidiary of the Company, was the only proper party defendant. The Company operates the "Southern Railway System" (hereinafter called the "System"), which is composed of the Company and fifty wholly owned subsidiaries. The issue before this Court turns on whether or not the Company should be considered as a separate entity from other companies in the System for purposes of a suit by a railroad employer under F.E.L.A., or whether, within the context of this suit (employee versus employer—F.E.L.A.) CNO&TP should be considered merely as an operating division of the Company, as a business conduit, and the Company is proper party defendant in this claim.

We think the issue is fairly stated in Garret v. Southern Railway Co., 278 F. 2d 424 (CCA 6 1960), cited by the defendant. *Garrett* quotes from Kentucky Electric Power Co. v. Norton Coal Mining Co., 19 F. 2d 923 (CCA 6), as follows:

> "If such stock ownership and potential control be resorted to *only* for the purpose of *normally* participating in the affairs of the subsidiary corporation in a manner *usual* to stockholders and *not* for the purpose of taking some unfair advantage of the subsidiary *or using it as a mere adjunct to the main corporation* or as a subterfuge to justify wrongdoing, their identity as separate corporations will not be disregarded . . ." (Emphasis added).

The question in this case is whether or not Southern Railway Co., within the context presently before us, should be considered as a parent company just "normally participating in the affairs of a subsidiary corporation in a

manner usual to stockholders," or should be considered as "using it (the subsidiary) as a mere adjunct to the main corporation," i.e., merely as a business conduit.

Every case must be considered in the context in which the facts of the case place it. In *Garrett,* the issue was not the same as in the present case. In *Garrett,* an employee of Lenoir Car Works, a Tennessee corporation, which was a wholly owned subsidiary of Southern Railway Co., was claiming the right to sue under F.E.L.A. as a railway employee because Lenoir Car Works is owned by Southern Railway Co. The work involved was not that usual to railroad workers, but the employee hoped to qualify under F.E.L.A. by piercing the corporate veil. The holding was that the employee did not acquire status as a railroad employee because the Company owned Lenoir, a manufacturing subsidiary.

In Durham v. Southern Railway Co., 256 F. Supp. 879 (W.D. Va. 1966) cited by defendant, the Court holds that "the facts of this case warrant a holding that Carolina and Northwestern, though a member of Southern Railway *System,* was an entity separate and distinct from the Southern Railway Co.". The Court states:

> "[T]his is not a case for disregarding the corporate entity in order to prevent injustice," (nor a case) "where the subsidiary is little more than a sham, operating under the exclusive control and direction of the parent through the medium of assignment of employees of the parent for the operations of the subsidiary. Carolina and Northwestern is, in all respects (including financially) independent of Southern (see Railroad Exhibit 6, the Sixty-Eighth Annual Report of the Carolina and Northwestern Railway Com. for the year ended December 31, 1965)."

The evidence in *Durham* on the motion for summary judgment was apparently different than the evidence before this Court in the present case. Here, the only evidence presented on motion for summary judgment is of consolidated operations, employees performing services for both companies, consolidated bookkeeping and accounting, consolidated tariff schedules, consolidated claims handling, and consolidation in all other significant respects in which the corporations do business. No evidence is presented of any aspect of the subsidiary's business not operated and controlled as a conduit for the parent's business.

We think the U.S. District Judge in *Durham* was probably unnecessarily restrictive in his application of the corporate barrier, but we think that, in any event, in the present case the evidence of "alter ego" (that the Company operated CNO&TP as a mere conduit, as opposed to "normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders (see *Garrett, supra.*)") is overwhelming.

It would unduly prolong this opinion to cite all the evidence seeming to indicate that it is appropriate to treat CNO&TP as a division of the Company, as opposed to treating it as a separate Company. This is some of it. First, in the extensive claims negotiations between the Company claims agent and the plaintiffs' counsel, counsel corresponded directly with the Company instead of against CNO&TP. Response was made without any suggestion that counsel was in error or that correspondence should be directed, instead, to CNO&TP. Correspondence from defendant's claims agents continued on stationary variously headed Southern Railway System, Danville, Ky., and then from J. E. Rogers, Claims Agent, Louisville, Ky., on stationary designated Southern Railway System. Later, Rogers, writing from the same office, still calling himself

District Claims Agent, wrote on stationary with the same address bearing the designation CNO&TP.

Next in this case, pay checks to plaintiffs specified "Southern Railway System," "Southern Railway Co. & Affiliated Companies," "Agent for Cincinnati, New Orleans and Texas Pacific Co." W-2 Forms for plaintiffs were from "Southern Railway System, Southern Railway Co., Agent for System and Affiliated Lines" (no mention of CNO&TP). No doubt they felt they were working for a division of the Company, rather than for a separate company.

We will not detail the evidence related to consolidated balance sheets, consolidated accounting operations, consolidated tariff schedules, etc. Suffice it to say that we find the evidence overwhelming that the situation at hand goes far beyond the normal corporate relationship between a parent and a wholly owned subsidiary.

Defendant cites American Commercial Lines, Inc. v. Ostertag, Ky. App. 582 S. W. 2d 51 (1979) as controlling in this case. Although there are facts in that case similar to the present, there is no indication that the evidence approached the interlocking nature of the Company—CNO&TP operation in the present case. There is no indication that many of the factors present in our case were present in *Ostertag*. For instance, in *Ostertag* the opinion states that "Inland Tugs, and not ACL" was the employer by whom the employee was paid. "Inland had its own bank accounts, issued its own financial statement, operated out of its own offices, and negotiated its own labor contracts." No such facts have been offered by the present defendant. Instead, such proof as has been offered, is seemingly to the contrary.

Dealing more specifically with the structure of Southern Railway Co. (as opposed to other companies) and with Southern Railway Co. at the present time (as opposed to whatever may have been the corporate structure fifteen

years ago when *Garrett* and *Durham* were being considered) we come to the opinion by the Hon. Thomas A. Ballantine, Jr., U.S.D.C., W.D. Ky., in Seaboard Coastline Railroad v. Southern Railway Co., C 77-0052-L(B). In an action involving charges that "Southern refused to follow routing instructions for the shipment of coal," Southern moved to dismiss for failure to join "an indispensable party, the Interstate Railroad Co.," which was the wholly owned subsidiary directly involved. The Court states:

> "In opposition to this motion, plaintiffs have tendered a number of exhibits which, it is argued, demonstrate that Interstate Railroad is no more than a division or an agency of Southern Railway System. The tariff filed by Southern Railway System lists sixteen railroad companies, all designated 'SOU.' The official Railway Guide includes the sixteen lines as the Southern Railway System. Robert Hamilton, Executive Vice-President of Southern Railroad Co., testifying before the ICC on February 11, 1977, was asked:
>
> "Q. From Southern's perspective, am I correct you do regard Interstate as a division of Southern Railway?
>
> A. Yes, we do . . . ."
>
> It would extend this Memorandum beyond reasonable length to cite all the other indicia of Southern Railway System's control of Interstate. It is sufficient to say that they reinforce that which is discussed above."
>
> The Court then holds:
>
> "For this Court to permit itself to be blinded or deceived by the mere forms would be a manifest injustice. . . . Defendant's motion to dismiss for failure to join an indispensable party will be denied."

The issue in *Seaboard* was, of course, different than in the present case. However, the facts bearing on whether

the defendant should be considered a separate corporate entity for the purposes of the suit, are substantially the same. We think Judge Ballentine's conclusion, applying the U. S. Supreme Court decision by Justice Clark in Chicago, M. & St. P. Railway Co. v. Minneapolis Civic & C. Association, 247 U. S. 490, 38 S. Ct. 553 (1918), applies here. Mr. Justice Clark said:

> "While the statements of the law thus relied upon (by the defendant) are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies."

Southern Railway System does not exist, except as an operation of Southern Railroad Co. The System has no separate corporate nature. It is simply the business of the Company, and operates simply to carry out the corporate operations of the Company and its operating subsidiaries. We think these plaintiffs were reasonable in concluding they were employees of the System, and, therefore, of the Company.

There is another Supreme Court case, which we think significant. It is Sinkler v. Missouri Pacific Railroad Co., 356 U. S. 318, 78 S. Ct. 758 (1958). In this F.E.L.A. case, the plaintiff, as in the present case, was actively involved as a railroad worker. The issue was, as in the present case, had he sued the wrong company as employer. The Court states (page 762):

> "However, in interpreting the FELA, we need not depend upon common-law principles of liability. This

> statute, an avowed departure from the rules of the common law . . ., was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety.
>
> "This broad purpose controls our decision in determining whether the Belt Railway and its switching crew were 'agents' of the respondent within the meaning of the section. Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job."

The opinion in *Sinkler* goes far beyond our decision in the present case. It goes so far as to disregard the obviously separate "corporate autonomy of the Belt Railway" when in the particular operation involved in the accident the Company was "engaged in furthering the operational activities of (defendant railroad)." We need only decide, for purposes of the present case, and in the posture in which the issue of corporate autonomy is presented to us, that the subsidiary, CNO&TP, should not be considered autonomous.

Plaintiffs cite L&N R. Co. v. Carter, 226 Ky. 561, 10 S. W. 2d 1064 (1928), an opinion by Judge Dietzman, affirming a substantial F.E.L.A. award against L&N for a fireman employed by the Franklin & Cincinnati Railroad Co. Without detailing all of the facts, it was apparent that L&N was controlling the operations of F&C, much in the way that the Company controls CNO&TP in the present case. Some of the colorful language by Judge Dietzman has direct application to the present case (page 568):

> "The president and general manager of the F&C, Mr. Manning, was made such at the instance of the appellant (L&N). As such, he took no action involving any

matter of policy without first consulting the officers of the appellant. . . . When the accident our of which this arose, occurred, it was the appellant's claim agents and investigators who were sent to look into the matter. . . . *If here ever was a case of the hands of Esau and the voice of Jacob, this was one.* The appellant insists that the mere ownership of all of the capital stock of one corporation by another does not render the latter corporation responsible for the liabilities or acts of the owned corporation. Whether that proposition of law be true or not, it certainly has no application to the facts of this case. This question of whether the appellant was the real party in interest was submitted to the jury under appropriate instructions, and the evidence leaves no doubt whatever that its finding that the operation of the F&C under the fiction of its corporate entity was but a sham and pretense on the part of the appellant . . . Courts do not hesitate to ignore the corporate fiction and to draw aside the veil of corporate entity where necessary to reach justice and prevent fraud."

There are two other earlier Kentucky cases, not cited by plaintiffs, which we consider important because they turn on the question of the corporate "separateness" of Southern Railway Co. and its subsidiaries.

In Commonwealth v. Southern Ry. Co., 193 Ky. 474, 237 S. W. 11 (1921), the Court found the Southern Railway Co. responsible for taxation by reason of its ownership and operation of a wholly owned subsidiary, "Southern Railway Co. in Kentucky," the Court states:

"Defendant (the Southern Railway Co.) could not have more effectually operated these lines if it had done so in its own name. Every act looking to the control and management of them during the times mentioned was

set in motion and actually executed by the same brains which conducted the operation of its admittedly owned lines, and the income from the Kentucky operation was sent to and presumably disbursed by the same officer who received and disbursed the income from the Southern Railway system proper. The defendant gave out to its stockholders and announced to the traveling public that it owned the lines of the 'Southern Railway Co. in Kentucky,' and to allow it to escape taxation on its just proportion of its intangible property subject to taxation in Kentucky, because of the mere shell or hull in whose name it was operating its Kentucky division would not only be surrendering substance to the shadow, but would demand of us that we shut our eyes to the facts."

Finally, in Southern Railway Co. v. Thomas, 90 S. W. 1043, 28 KLR 951 (1906), in an action against "Southern Railway Co. in Kentucky" for injury to mules "from the neglect to feed and water them while they were carried by the Cincinnati, New Orleans and Texas Pacific Railroad and by the Southern Railway, wherein Southern Railway in Kentucky alleged it had no liability because it claimed to be a separate corporate entity from Southern Railway Co., the Court stated (based on many facts in the parent—subsidiary relationship which exists in the present case):

"Taking all the proof together, there was sufficient to warrant the jury in concluding that the Southern Railway in Kentucky is simply one of the divisions of the Southern Railway Co., and that, although a different corporate name is used, it is the same thing as the Southern Railway Co.; the name only being changed by adding the words 'in Kentucky.' In determining the liability of the corporation, the Court will look at the substance and not the mere form."

We think that the views of the Kentucky Supreme Court in *Commonwealth* v. *Southern Ry. Co.* and in *Thomas,* where Southern Railway Co. was the defendant, must outweigh the views of the Kentucky intermediate appellate court in *Ostertag,* where there are similarities but a different company involved—American Commercial Lines, Inc.

Thus, we see that the Company has had its corporate veil pierced already, at least two times, by the Kentucky Supreme Court in an age when such a "virtue" was more highly regarded than it is now. We do not break new ground in this case, but simply plant in an old furrow.

The "bottom line" on the present case is that Selby and Whitehead (and their attorneys) knew very well that they were working for CNO&TP, but had no reason to consider CNO&TP anything more than a mere business conduit, an operating division (as opposed to a separate corporation) from Southern Railway Co. It is not difficult to understand why they assumed Southern Railway Co. was the proper party to sue as the actual employer. The situation must appear to an employee of CNO&TP, exactly the same as the business situation of an employee of Chevrolet Motor Division of General Motors Corporation. There is no reason for such an employee to be concerned with the form, as opposed to the substance of his relationship with his employer.

The law contemplates that cases should be tried on their merits, as opposed to being dismissed for technicalities lacking in substance. Further, the U. S. Supreme Court has directed that this is particularly true with reference to treatment of railroad employees in F.E.L.A. cases.

In both cases, the motions for summary judgment are overruled.

(s) Charles M. Leibson, Judge

Date:_____

Entered in Court: March 6, 1981

Paulie Miller, Clerk

By: (s) Linda Ritter
Deputy Clerk

cc: Robert P. Hastings
Charles D. Greenwell
Frank E. VanBree (Chicago)
James Clay (Danville, Ky.)
Thomas E. Utley, Jr. (Somerset, Ky.)

JEFFERSON CIRCUIT COURT

DIVISION 9

No. 79-CI-10368

SAMUEL L. WHITEHEAD - - - - - *Plaintiff*

v.

SOUTHERN RAILWAY COMPANY and
CINCINNATI, NEW ORLEANS, AND
TEXAS PACIFIC RAILWAY COMPANY - - *Defendants*

DEFENDANT, SOUTHERN RAILWAY COMPANY'S PROPOSED JURY INSTRUCTIONS

Defendant, Southern Railway Company, by counsel, without waiving its motion for directed verdict, requests the Court to instruct the jury as follows:

Respectfully submitted,

Charles D. Greenwell
Kathiejane Oehler
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
(502) 584-1135

Counsel for Defendant
Southern Railway Company

INSTRUCTION NO. ____

The law is for the defendant railroads and you shall so find.

INSTRUCTION NO. ____

Defendant Southern requests that any instruction of the Court include instruction to the jury on the following specific provisions of law:

1. An employer railroad cannot be held liable for the "frequently impossible task of furnishing absolutely safe instrumentalities or places to work." The duty imposed on the railroad employer by the FELA to provide a reasonably safe place to work is never an absolute one and the duty requires elimination of only those dangers which can be removed by reasonable care on the part of the employer. If certain dangers cannot be removed through the exercise of reasonable care by the railroad company employer, then the fact that such dangers exist does not constitute a breach of the employer's duties to the employee under the FELA and without a breach of such duty, the railroad employer cannot be liable to the employee under the provisions of the FELA, regardless of the degree of injuries sustained by the employee.

2. The Federal Employers' Liability Act does not make the employer railroad an insurer of the safety of its employees while they are on duty. The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.

3. The basis of the employer railroad's liability is its negligence, not the mere fact that the injury occurred.

4. The employer railroad's duty to its employees is to use reasonable care and prudence to the end that the place in which they are required to work, and the appliances with which they work, are reasonably suitable and safe for the purpose, and in the circumstances, in which they are to be used. The test is not whether the tools to be used and the place in which the work is to be performed are absolutely safe, nor whether the employer railroad knew the same to be unsafe, but whether or not the employer railroad has exercised reasonable care and diligence to make them safe.

5. Temporary conditions produced by the employee negligently using, or negligently failing to use, appliances provided by the employer, are not defects for which the employer is liable. Nor is it actionable negligence that an employer railroad fails to anticipate lack of care on the part of an employee.

6. The employer railroad is not required to furnish the employee the latest, best, or most perfect appliances with which to work, nor to discard standard appliances already in use upon the discovery of later improvements, provided those in use are reasonably safe and suitable.

See, Stinnett v. *Buchele,* Ky. App., 598 S. W. 2d 469 (1980), discretionary review denied, Ky. 606 S. W. 2d 769 (September 16, 1980); *Louisville & Nashville Railroad Co.* v. *Marshall,* Ky. 603 S. W. 2d 923 (1980); and *Atlantic Coast Line R. Co.* v. *Dixon,* 189 F. 2d 525 (1951).

INSTRUCTION NO. ____

The defendant is not an insurer — it is not liable simply because there was an accident and injury, if that was without fault on its part. Nor is it liable simply because there

may be some danger in connection with its normal and customary railroad operations. Nor is it enough to show only that if it and its employees had acted in some way different from the way in which they did act, the accident might not have happened. The defendant does not have the burden of proving freedom from fault — to the contrary, the burden of proving fault is on the party who charges it, and, in this case, as to any claimed fault of defendant unless the plaintiff sustains the burden of proving it by preponderance of the evidence, your verdict must be in favor of defendant.

INSTRUCTION NO. ____

You are instructed that in respect to the claim of negligence made by plaintiff, if the plaintiff was an experienced conductor and could have done his work in safety by the exercise by him of that care which an ordinarily prudent person would have used in the circumstances, then, in the absence of notice to the contrary, defendant was entitled to assume that he would use that care, that no injury would result to him as a result of his own conduct, and it was not negligence for it to do so, nor was defendant required to take special steps to warn or protect him from the result of his own acts.

Atlantic Coast Line RR Co. v. *Dixon,* 189 F. 2d 525 (5th Cir. 1951); *Louisville & N. R. Co.* v. *Greenwell's Adm'r,* Ky. App., 125 S. W. 2d 1054 (1910); *Cincinnati, N. O. & T. P. Ry. Co.* v. *Goldston,* Ky., 161 S. W. 246 (1913); *Louisville & N. R. Co.* v. *Fox,* Ky., 42 S. W. 922 (1897); *Krum* v. *St. Louis, I. M. & S. Ry. Co.,* Ark. 76 S. W. 1075 (1903); *Conser* v. *Atchison, T. & S. F. Ry. Co.,* Mo., 266 S. W. 2d 587 (1954).

INSTRUCTION NO. ____

You are instructed that with respect to the claimed negligence of the defendant, under the Federal Employers' Liability Act, during all the time he was working and at the time he was injured, the law imposed upon the plaintiff the duty to exercise reasonable care for his own safety. The defendant owed him no duty to exercise a higher degree of care for his safety than he himself owed. He was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment not resulting from negligence or a violation of a statutory duty and to protect himself from injury from such hazards however and whenever they might be encountered. There is nothing in any of the circumstances of this case which suspended that duty, relieved him from performing it or excused a violation of it, if any. If the plaintiff failed to perform the duty which the law imposed upon him, he was guilty of negligence.

INSTRUCTION NO. ____

It was the duty of the plaintiff on the occasion about which you have heard evidence to exercise ordinary care for his own safety. Such duty included the following specific duties:

1. To remain in his seat provided for him in the caboose at all times while the train was in movement;

2. To remain in his seat and brace himself to protect against injury from the usual and ordinary slack action involved in freight train operation;

3. To alert the engineer of the train if there was any unnecessary and unusually violent jerks and jars in the operation of the train;

4. To defer leaving his seat to place coal in the stove until such time and place on the run between Danville and Oakdale such action could be taken in reasonable safety;

5. To watch for slow orders and to communicate same to the engineer far enough in advance of the slow order area that the engineer could comply with same without any necessity for sudden change in speed;

6. To warn the engineer that he was out of his seat and in a position of peril at all times when the engineer had the right to assume that plaintiff would be in his seat and be braced for slack action;

7. Not to leave his seat at the fixed locations along the run from Danville to Oakdale where slack action is normally anticipated to occur;

8. To be in charge of the train and the crew on it on the run from Danville to Oakdale and to alert the engineer in the event of any unnecessarily rough operation of the caboose end of the train and issue such instructions as necessary to correct same.

If you believe from the foregoing instructions that plaintiff violated one or more of the foregoing duties and that such failure, if any, was the sole cause of his alleged injury, the law is for the defendant railroads and you shall so find.

INSTRUCTION NO. ____

It was the duty of the Plaintiff, Samuel L. Whitehead, to minimize the damages he allegedly sustained on or about November 29, 1976, if any, by following the advice of his Kentucky physicians. If you are satisfied from the evidence that Plaintiff breached his duty to mitigate damages, then Plaintiff is not entitled to recover damages from the Defendant railroads to the extent that the Plaintiff's alleged injuries were aggravated or increased by such failure.

James v. *Krpan*, 116 Ariz. 216, 568 P. 2d 1114 (1977).

INSTRUCTION NO. ____

It was the duty of the Plaintiff, Samuel L. Whitehead, to exercise ordinary care in the selection of a physician to treat the injuries, if any, he allegedly sustained on November 29, 1976. If the jury is satisfied from the evidence that the Plaintiff breached his duty, then you shall find that the Defendant railroads are not liable for all or so much of Plaintiff's damages as you believe from the evidence were a result of Plaintiff's negligent selection of a physician.

Sheeman v. *American Steamship Company*, Mich. App., 280 N. W. 2d 852 (1979).

INSTRUCTION NO. ____

You are instructed that the fact that railroad companies furnish and pay for medical care for their employees does not impose liability on the Defendant(s) for damages. Such payments are not to be construed as evidence of a violation of the Federal Employee's Liability, nor should they be construed as any admission of liability by the Defendants for the law encourages payments of this nature solely for humanitarian purposes.

Fields v. *Rutledge*, Ky., 284 S. W. 2d 659 (1955).

George M. Donnelly v. *Pennsylvania R.R.*, 342 Ill. App. 556, 97 N. E. 2d 846 (1950).

INSTRUCTION NO. ____

If you should find that the plaintiff himself was guilty of some contributory negligence and that his fault caused or contributed to cause and bring about any injuries which he may have sustained, then you must compare the negli-

gence of the parties and return a verdict in favor of the plaintiff for a reduced amount based upon that comparison.

The proper procedure to be followed by the jury in comparing negligence of the parties and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison is you must first determine the full amount of all damages sustained by the plaintiff as a result of the accident; next, compare the negligence or fault of the parties by determining in what proportion, figured in percentage, plaintiff's own fault contributed as a proximate cause of all damages suffered by the plaintiff as a proximate result of the accident and then reduce the full amount of plaintiff's damages by subtracting a sum equal to that percentage. You shall use the following interrogatories to determine the question of comparative negligence.

1. Was the defendant negligent? You will answer yes or no: _____

If your answer is no, that's the end of it and you go to the end of the interrogatories and there's a line for the foreman to sign.

On the other hand, if your answer is yes, then you must answer the remaining interrogatories.

2. If your answer to No. 1 was yes, then does the negligence have some casual connection with the plaintiff's injury: You will answer yes or no: _____

If your answer is no, that's the end of it and you go to the end of the interrogatories and there's a line for the foreman to sign.

On the other hand, if your answer is yes, you must go to the third interrogatory, which is:

3. Was the plaintiff himself negligent? You will answer yes or no: _____

If you answer is yes, then you go on to the fourth interrogatory which is expressed in percentage.

4. To what extent did the plaintiff's negligence contribute to his injury: _____%

5. What amount do you find without reduction for any negligence that you may find on the plaintiff's part will fairly and adequately compensate the plaintiff for the injury he received? $_____

INSTRUCTION NO. ____

You are the sole judge of the credibility of all of the witnesses who have testified in this case and of the weight to be given to their testimony. A witness is presumed to speak the truth; but this presumption may be repelled by the manner in which he testified, by the nature of his testimony, by contradictory evidence, by his motives or by evidence affecting his character for truth, honesty, or integrity, and in determining the weight to be given to the testimony of the witness, you have the right to consider the appearance of each witness on the stand, his manner of testifying, his apparent candor or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, his knowledge and means of knowledge of the subject upon which he testified, together with all the other circumstances appearing in evidence on the trial.

If you believe that any witness who has testified in this case has testified falsely with respect to any material testimony, you must disbelieve that portion of his testimony. You may also disregard the entire testimony of such a witness or you may give such testimony as you believe such weight as you deem proper under the circumstances.

The number of witnesses produced does not control. You decide on the evidence which satisfies you as to its truth.

INSTRUCTION NO. ____

A corporation can act only through its agents, officers and employees. And the burden is on the plaintiff to establish by a preponderance of the evidence in this case that the negligence of one or more officer, employee or other agent of the defendant, other than the plaintiff himself, was a proximate cause of any injury and consequent damages sustained by the plaintiff. Any negligent acts or omission of an officer, employee or other agent of a corporation in the performance of his duties is held to be negligence of the corporation.

PLAINTIFF'S REQUESTED JURY INSTRUCTIONS

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of

the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as as indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 71.01

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 2

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Samuel Whitehead, and the answers thereto of the defendant, Southern Railway Company. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 71.02

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 3

The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them;

and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed. Dispositions have also been received in evidence. These contain sworn testimony, with counsel for each party being entitled to ask questions. A deposition may be accepted by you, subject to the same instructions which apply to testimony in open court.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, however, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved .

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judge of the facts.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 11.11

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 3A

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witnesses, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 73.01

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 4

The plaintiff in this case claims damages for personal injuries, alleged to have been suffered as a result of negligence on the part of the defendant, his employer.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.01

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 5

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.02

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 6

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.03

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 7

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was

exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.04

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 8

Plaintiff alleges that the defendant's conduct, at the time and place in question, was negligent in one or more of the following particulars:

a. Defendant was careless and negligent in that the said train, the track upon which it was running and the operators of the engine pulling it, being solely under the management, operation, control of and in the exclusive possession of the defendant, were in such condition and were so handled that the caboose in which plaintiff was riding was caused to make an extraordinary and violent run out of slack, seriously injuring the plaintiff at the time and place set forth;

Or In The Alternative:

b. In failing to use ordinary care to give the plaintiff timely and adequate warning of the aforesaid run out of slack;
c. In failing to use ordinary care to furnish plaintiff with a reasonably safe place in which to work;
d. By and through the operators of the engines of the aforementioned train in handling the controls thereof in such manner as to cause a sudden, extraordinary and violent run out of slack;
e. In moving said train along said track in contravention of its rules and regulations in full force and effect at the time and place alleged;

f. In hauling in said train a greater number of cars than was reasonably and proper to allow for the safe handling of the said train.

Devitt & Blackmar Fed. Jury Instr. 34d Ed. 94.08

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 9

Section 1 of the Federal Employer's Liability Act [45 U.S.C.A. § 51] under which the plaintiff claims the right to recover damages in this action which the plaintiff claims the right to recover damages in this action, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines . . . track . . . or other equipment.

It is agreed that, at the time and place alleged in the complaint, the defendant was a common carrier by railroad, engaged in interstate commerce; that the plaintiff was then an employee of the defendant, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case in governed by the provisions of the Federal Employers' Liability Act.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.09

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 10

It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.10

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 11

Section 4 of the Federal Employers' Liability Act (45 U.S.C.A. § 54) provides in part that:

> "In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

If the plaintiff's injury is caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of his employment, then the defendant em-

ployer would be responsible for the act or omission of the fellow employee

Devitt & Blackmar 3rd Ed. Fed. Jury Instr. 94.11

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 12

In order to prove the essential elements of plaintiff's claim of negligence, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case,, the following facts: *First,* that the defendant was negligent in one or more of the particulars alleged; and *second,* that the defendant's negligence caused or contributed to some injury and consequent damage sustained by the plaintiff.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.12

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 13

Although the burden is on the party, who asserts the affirmative of an issue to prove his claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 71.13

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 14

For purposes of this action injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission.

Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.13

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 15

This does not mean that the law recognizes only one cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a cause for the purpose of determining liability in a case such as this one.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.14

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 16

Since a corporation can act only through its officers, or employees, or other agents, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the defendant, other than the plaintiff himself, was causally related to any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.15

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 17

If you find, however, (1) that the injury to the Plaintiff was caused by a sudden, unexpected and extraordinary slack action in the movement of the train, (2) that at the time of the accident the operation of the train and the track upon which it was running were solely under the management, operation and control of and in the exclusive possession of the defendant; and (3) that in the normal course of events the accident and ensuing injury would not have occurred without the negligence of those having the management, operation, and control and exclusive possession of the train and track upon which it was running, then you may find that the accident and ensuing injury were caused by the negligence of the defendant.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 80.08

PLAINTIFF'S REQUESTED JURY INSTRUCTION No. 17A

Section 3 of the Federal Employers' Liability Act [45 U.S.C.A. § 53] provides in part that:

> 'In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'

Section 3 of the Federal Employees' Liability Act [45 U.S.C.A. § 53] provides in part that:

> 'In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'

So, if you should find, from a preponderance of the evidence in the case, that the defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the plaintiff; and should further find, from a preponderance of the evidence in the case, that the plaintiff himself was guilty of some contributory negligence which contributed toward bringing about all or part of his own injury; then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.18

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 18

You are instructed that one who through negligence causes injury to another is liable for aggravation of the injury or consequences of the treatment whether or not the treating physician, surgeon or other medical specialist was negligent, provided the injured person uses reasonable care in the selection of such physician, surgeon or other medical specialist.

You are further instructed that if an injured plaintiff exercises reasonable care in selecting a physician, surgeon or other medical specialist, he may recover damages to the full extent of the injury sustained, even though the physician, surgeon or medical specialist does not use the most approved remedy or the best means of cure, or fails to exercise the degree of care or skill which any other physician, surgeon or other medical specialist might have exercised.

Adapted from instruction approved in: Edwards v. Goergen, 256 F. 2d 542 (1958)

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 19

As to the plaintiff's claims of negligence, the issues to be determined by the jury in this case are these:

First: Was the defendant negligent in one or more of the particulars alleged?

If your unanimous answer to that question is "No", you will return a verdict for the defendant; but if your unanimous answer is "Yes", you then have a second issue to determine, namely:

Second: Did the negligence of the defendant cause or contribute to any injury and damage to the plaintiff?

If your unanimous answer to that question is "No", you will return a verdict for the defendant; but if your unanimous answer is "Yes", you will proceed to determine the amount of plaintiff's damages, and return a verdict in the plaintiff's favor for that amount.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 94.20

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 20

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

(1) the reasonable value, not exceeding the actual cost to the plaintiff, of any examinations, attention and care by physicians and surgeons and other sworn by the evidence in the case to have been reasonably required and actually given in the treatment of the plaintiff;

(2) also the reasonable value, not exceeding the actual cost to the plaintiff, of any hospital accommodations and care, services of nurses or attendants, ambulance service, x-ray pictures, medicine and other supplies, if any, shown by the evidence in the case to have been reasonably required and actually used in the treatment of the plaintiff.

(3) also any reasonable and necessary expense to the plaintiff for medical, surgical, hospital and other services and care and supplies, which you find from the evidence in the case are reasonably certain to be required in future treatment of the plaintiff as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.03

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 21

If you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

(1) The reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation, as a result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled.

(2) Also such sum as will reasonably compensate the plaintiff for any loss of future earning power caused by the injury in question, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future. In determining this amount, you should consider what plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of his injuries, whether or not they are reasonably certain to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injury upon his future earning capacity, and, second, the present value of any loss of future earning power, which you find from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a result of the injury in question.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.04

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 22

If you should find that the plaintiff is entitled to a verdict, you will award him a sum which will compensate him reasonably for (1) any pain, suffering and mental anguish already suffered by him and resulting from the injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that he is reasonably certain to suffer in the future from the same cause.

Devitt & Blackmar Fed. Jury Instr. 3rd Ed. 85.05

JEFFERSON CIRCUIT COURT

NINTH DIVISION
JUDGE KEN G. COREY

No. 79CI10368

SAMUEL L. WHITEHEAD - - - - - *Plaintiff*

v.

SOUTHERN RAILWAY COMPANY - - - *Defendant*

INSTRUCTIONS TO THE JURY

The Court instructs the Jury as follows:

1. It was the duty of the Defendant, Southern Railway Company, (hereinafter referred to as Southern), acting through its officers, agents, and employees, to exercise ordinary care to provide the Plaintiff, Samuel L. Whitehead (hereinafter referred to as Whitehead), with a reasonably safe and suitable place in which to work, and reasonably safe and suitable equipment, including the caboose about which you have heard evidence.

If you are satisfied from the evidence that the Defendant, Southern, its officers, agents, or employees, failed to observe this duty and that such failure, if any, caused in whole or in part the injury to the Plaintiff, Whitehead, then your verdict will be in favor of the Plaintiff, Whitehead, against the Defendant, Southern. If the Jury finds for the Plaintiff under this Instruction, you are instructed to utilize Verdict Form I.

But unless you so believe, then you shall return a verdict for the Defendant, Southern. If the Jury finds for the Defendant, you are to utilize Verdict Form III.

2. It was the duty of the Plaintiff, Whitehead, on the occasion concerning which you have heard evidence, to exercise ordinary care for his own safety. If the Jury is satisfied from the evidence that he failed to observe this duty, and that such failure, if any, caused or contributed to cause and bring about the accident and his resulting injuries, then the Plaintiff, Whitehead was guilty of contributory negligence and you will so find.

3. Whenever an employee of a railroad is injured while engaged in the course of his employment, and the injury was caused in whole or in part from the negligence of any of the officers, agents, or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. Therefore, if you find that the Plaintiff, Whitehead, is guilty of contributory negligence, as set forth in Instruction #2 above such contributory negligence does not defeat or bar his recovery altogether, but the damages as hereinafter set forth shall be diminished by the jury in proportion to the amount of negligence attributable to him. If the Jury finds the Plaintiff Whitehead to have been contributorily negligent it shall determine the percentage of such negligence and diminish any award to him by such percentage, and utilize Verdict Forms I and II.

4. If you believe from the evidence that the Plaintiff, Whitehead, was negligent in that he violated the duty imposed upon him by Instruction #2, and that such failure, if any there was upon his part, was the sole cause of his accident and resulting injury, then you shall return a verdict for the Defendant Southern. If you so find, you shall utilize Verdict Form III.

5. If the jury finds for the Plaintiff, Whitehead, you will award him such sum in damages that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence that he has sustained

directly by reason of the accident. However, you should not allow him any compensation for any affliction which he has which did not directly result from the injury he claims to have received from the occurences referred to in this case.

You are further instructed that if you find that the Plaintiff exercised reasonable care in selecting a physician or surgeon, he may recover damages to the full extent of the injury sustained, even though the physician or surgeon does not use the most approved remedy or the best means of cure, or fails to exercise the degree of care and skill which any other physician or surgeon might have exercised. You may award damages for any or all of the following:

a. for such pain and suffering, mental and physical, which he has endured and which you may believe from the evidence it is reasonably certain he will endure in the future.

b. for such permanent impairment of his power to labor and earn money as you may believe from the evidence he is reasonably certain to lose on or after November 2, 1983.

c. Any award under (b) above must be reduced to its present cash value and adequate allowance must be made for the earning power of money, and future earnings should be calculated on the length of time the Plaintiff would expect to be employed rather than on the time he would expect to live. You are entitled to consider on the one hand, all factors or circumstances such as illness, retirement either compulsory or voluntary, the nature and hazards of the employment of the Plaintiff, accidents, the possibility of obtaining other suitable employment, death, or other like matters which might tend to decrease the loss; on the other hand, you are entitled to consider such further factors as aptitude, industriousness, possibility of promo-

tion, increase in wages and other like matters which might lead to increase the loss.

d. For such sum in damages as you believe from the evidence will fairly and reasonably compensate the Plaintiff for the loss of wages or income that he was caused to lose from the date of the accident, November 29, 1976, to date, not to exceed on this account the sum of $204,143.00, the amount claimed by the Plaintiff.

e. For such sum in damages as you believe from the evidence will fairly and reasonably compensate him for reasonable medical expenses both in the past and in the future, not to exceed $4,959.00, as you believe from the evidence he sustained directly by reason of the injury.

Your whole award is not to exceed the sum of $1,000,000.00, the amount claimed by the Plaintiff in his complaint.

6. If you find for the Defendant, Southern, you will say so by your verdict and no more.

7. You are further instructed that your award to the Plaintiff, Whitehead, if any, will not be subject to any income taxes and you should not consider any such taxes in fixing the amount of your award.

8. "Negligence" is the failure to exercise ordinary care.

"Ordinary care" as applied to the Defendant, Southern, is that degree of care customarily exercised by ordinarily careful and prudent railroads under circumstances like or similar to those concerning which you have heard evidence.

"Ordinary care" as applied to the Plaintiff, Whitehead, means that degree of care which ordinarily reasonable and prudent conductors would exercise under circumstances like or similar to those concerning which you have heard evidence.

9. Nine or more of you may make a verdict. If less than twelve agree upon a verdict, all who agree thereto

will sign it. However, if your verdict is unanimous, only your Foreman, whom you yourselves will choose, need sign it.

Ken G. Corey, Judge

VERDICT NO. I

We the Jury, find for the Plaintiff, Samuel L. Whitehead, and award him damages against the Defendant, Southern Railway Company, as follows:

Medical expenses	4959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of his Power to Labor and Earn Money	—0—
TOTAL AWARD	209,102.00

(s) John D. Flodstrom
Foreman

Members of the Jury if not unanimous:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT NO. II

We, the Jury, find under Instruction Number 3 that the Defendant violated its duty owed to the Plaintiff, and further that the Plaintiff was contributorily negligent with reference to the November 29, 1976 accident.

Pursuant to Instruction Number 3, we find the total damages sustained by the Plaintiff to be as follows:

Medical expenses	$4,959.00
Lost Wages	204,143.00
Pain and Suffering	—0—
Impairment of His Power to Labor and Earn Money	—0—
TOTAL AWARD	$209,102.00

_____

Foreman

We further find that the Plaintiff was contributorily negligent to the extent of 90% and therefore reduce the Plaintiff's damages by such percentage.

_____

Foreman

Members of the Jury so finding if not unanimous:

(s) John D. Flodstrom
(s) Mary Katherine Harlow
(s) Kenneth W. Frick
(s) Dorothy H. Graf
(s) Not Legible
(s) Not Legible
(s) Not Legible

(s) Not Legible
(s) Not Legible
(s) Not Legible

_____

_____

VERICT NO. III

We, the Jury, find for the Defendant, Southern Railway Company, and award the Plaintiff, Samuel L. Whitehead, nothing.

_____
Foreman

Members of the Jury so finding if not unanimous:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____